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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-.....

GEORGE D. OWEN,
Petitioner,

vs.

THE CITY OF INDEPENDENCE, MISSOURI, LYLE W. ALBERG, CITY MANAGER, RICHARD A. KING, MAYOR, CHARLES E. CORNELL, DR. RAY WILLIAMSON, DR. DUANE HOLDER, RAY A. HEADY, MITZI A. OVERMAN, AND E. LEE COMER, JR., MEMBERS OF THE COUNCIL OF THE CITY OF INDEPENDENCE, MISSOURI,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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TABLE OF CONTENTS

Opinions Below 2

Jurisdiction 2

Questions Presented 2

Statutory Provisions Involved 3

Statement of the Case 3

Reasons for Granting the Writ—

I. The Decision Below Erred in Its Resolution of an Important and Recurring Issue Significantly Affecting the Administration of Justice—Whether Qualified Immunity Should Be Extended to Local Governmental Bodies 7

II. The Decision Below Conflicts With Decisions of Other Courts of Appeal on Whether Local Governmental Bodies—As Opposed to Local Officials—May Assert a "Good Faith" Defense to Suits Under 42 U.S.C. §1983 9

III. The Decision Below Misinterprets §1983 by Denying Equitable and Declaratory Relief and by Denying Petitioner Attorneys Fees 11

Conclusion 12

Appendix A—Opinion of the Court of Appeals on Remand (589 F.2d 335) A1

Appendix B—Opinion of the Court of Appeals (560 F.2d 925) A8

Appendix C—Opinion of the United States District Court (421 F.Supp. 1110) A46

Appendix D—Supreme Court of the United States Memorandum Order (438 U.S. 902, 98 S.Ct. 3118, 57 L.Ed.2d 611) A79

Table of Authorities

CASES

Bertot v. *School District No. 1, Albany County, Wyoming*, No. 76-1159 (Argued May 15, 1979) 10
Birnbaum v. *United States*, 588 F.2d 319 (2nd Cir. 1978) 8
Bursey v. *Weatherford*, 528 F.2d 483 (4th Cir. 1975), *rev'd on other grounds*, 429 U.S. 545 (1977) 10
Carey v. *Piphus*, 435 U.S. 247 (1978) 10, 11
Carter v. *Carlson*, 447 F.2d 358 (D.C. Cir. 1971), *rev'd on other ground sub nom., District of Columbia* v. *Carter*, 409 U.S. 418 (1973) 8
Cooley v. *Board of Education of Forrest City School District*, 453 F.2d 282 (8th Cir. 1972) 10
Hander v. *San Jacinto Junior College*, 519 F.2d 273 (5th Cir. 1975), *aff'd per curiam on rehearing*, 522 F.2d 204 (5th Cir. 1975) 9
Hostrop v. *Board of Junior College District No. 515*, 523 F.2d 569 (7th Cir. 1975), *cert. denied*, 425 U.S. 963 (1976) 10
Hutto v. *Finney*, 437 U.S. 678 (1978) 11
In re Primus, 436 U.S. 412 (1978) 8
Monell v. *Department of Social Services*, 436 U.S. 658 (1978) 5, 7, 8
Mt. Healthy City Board of Education v. *Doyle*, 429 U.S. 274 (1977) 8
N.L.R.B. v. *Jones & Laughlin Steel Corporation*, 301 U.S. 1 (1937) 12
Robertson v. *Wegmann*, 436 U.S. 584 (1978) 8
Strickland v. *Inlow*, 485 F.2d 186 (8th Cir. 1973) 11
Thomas v. *Ward*, 529 F.2d 916 (4th Cir. 1975) 10
Wellner v. *Junior College Board*, 487 F.2d 153 (8th Cir. 1973) 10
Wood v. *Strickland*, 420 U.S. 308 (1975) 7, 9, 12

STATUTES

28 U.S.C. §1254(1) 2
42 U.S.C. §1983 .....3, 7, 8

OTHER AUTHORITY

1978 Annual Report of the Director, Administrative Office of the United States Courts 7

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GEORGE D. OWEN,
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vs.

THE CITY OF INDEPENDENCE, MISSOURI, LYLE W. ALBERG, CITY MANAGER, RICHARD A. KING, MAYOR, CHARLES E. CORNELL, DR. RAY WILLIAMSON, DR. DUANE HOLDER, RAY A. HEADY, MITZI A. OVERMAN, AND E. LEE COMER, JR., MEMBERS OF THE COUNCIL OF THE CITY OF INDEPENDENCE, MISSOURI,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit dated December 1, 1978.

OPINIONS BELOW

The opinion of the Court of Appeals on Remand is reported at 589 F.2d 335 and is printed in Appendix A at pp. A1-A7. The prior opinion of the Court of Appeals is reported at 560 F.2d 925 and is printed in Appendix B at pp. A8-A45. This Court's previous memorandum order is reported at 438 U.S. 902, 98 S.Ct. 3118, 57 L.Ed.2d 611, and is printed in Appendix D at p. A79. The opinion of the District Court is reported at 421 F.Supp. 1110 and is printed in Appendix C at pp. A46-A78.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on December 1, 1978. Petition for rehearing was denied by a divided court on January 29, 1979. The time for filing a petition for writ of certiorari was extended to May 29, 1979 by order of Justice Blackmun signed April 10, 1979. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Should the qualified immunity available to local officials in their individual capacities under *Wood* v. *Strickland* be extended to local governmental bodies?

2. If qualified immunity is extended to municipalities, should it be further extended to bar declaratory and equitable relief as well as damages?

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42:

§1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

On and before April 18, 1972, petitioner was employed as the chief of police of Independence. Under Section 3.3(1) of the city charter, he could be removed by the city manager only "when deemed necessary for the good of the service." (App. at A32)

During a city council meeting on April 17, 1972, Paul Roberts, in his capacity as city councilman, read a written statement "impugning Owen's honesty and integrity." (App. at A31) The statement alleged that Owen had misappropriated police department property, that narcotics had "mysteriously" disappeared from his office, and that high ranking police officials had made "inappropriate" requests affecting the police court. It also alleged manipulation of traffic tickets, the "unusual release of felons" and the mysterious disappearance of money. As part of his statement, Roberts moved that certain "investigative reports" allegedly supporting the allegations be turned over to the

prosecutor for presentation to the grand jury, that they be released to the press and that the city manager take "direct and appropriate action" against those "involved in illegal, wrongful, or gross inefficient activities." The full text of the statement and motion is set forth at A54 n. 2.

The city council by official action passed the motion with one abstention and no dissents, thus lending its support to Roberts' charges. (App. at A16, A31) The following day, the city manager discharged Owen. (App. at A26) The discharge notice contained no reason for the discharge but stated simply that Owen was "[t]erminated under the provisions of Section 3.3(1) of the City Charter." (App. at A31) The city manager reinforced the council's implication that Owen was guilty of wrongdoing by publicly announcing that he was referring the reports of alleged police department inefficiency to the prosecutor for submission to the grand jury. (App. at A3-4 and A31 n. 11) He did not disavow the charges or the council's actions or take any steps to contradict reports that Owen's discharge was the direct result of the alleged misconduct.

The press and public were present at the April 17, 1972 city council meeting. (Tr. at 12, 49, 82 and 189) Copies of the statement and motion were distributed to them. The statement, motion and firing received widespread publicity. (App. at A31) The area newspapers printed the statement and motion substantially verbatim and reported the adoption of the motion. Front page articles appeared for several days under headlines such as "Lid Off Probe, Council Seeks Action" (Independence Examiner, April 18, 1972, P.Ex. 5, Tr. 25); "Independence Accusation. Police Probe Demanded" (Kansas City Times, April 18, 1972, P.Ex. 6, Tr. 25); "Probe Culminates in Chief's Dismissal" (Independence Examiner, April 19, 1972, P.Ex. 13, Tr. 27) and "Police Probe Continues; Chief Ousted". (Community Observer, April 20, 1972, P.Ex. 14, Tr. 27) A copy of the statement and motion was placed in the City's permanent records. (Tr. at 81-82)

Owen's request for a hearing was denied by the City by letter dated May 3, 1972 from the city counselor's office. (App. at A4 and A17) The grand jury subsequently returned a no true bill.

Owen brought suit under 42 U.S.C. §1983, and the Fourteenth Amendment asserting jurisdiction under 28 U.S.C. §1331, 28 U.S.C. §1343(3) and 28 U.S.C. §1343(4). He sought declaratory and equitable relief, including a hearing on his discharge, back pay and attorney's fees. The District Court entered judgment for defendants. (App. C)

On appeal, the United States Court of Appeals for the Eighth Circuit reversed, ordering the entry of a declaratory judgment that Owen's discharge had deprived him of liberty without due process of law. In lieu of an award of full back pay, it ordered equitable compensation measured by the amount Owen would have earned to retirement if he had not been deprived of his good name by the actions of the City less mitigation. The Court of Appeals held that the District Court had jurisdiction under 28 U.S.C. §1331 to grant equitable relief for Owen's Fourteenth Amendment claims. The court found it unnecessary to decide whether, under 28 U.S.C. §1343 and 42 U.S.C. §1983, the District Court also had jurisdiction to grant equitable relief against the city officials in their official capacities. (App. at A22)

On June 26, 1978, this Court vacated the Court of Appeals' prior decision for reconsideration in light of *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978). On remand, the Court of Appeals found that the City of Independence was subject to suit under *Monell* since the ac-

tions in question were those of the City's highest ranking officials. (App. at A3-4) It again found that petitioner had been deprived of liberty without due process. (App. at A3) However, the Court of Appeals ruled that petitioner should be denied all relief on the basis that the City was entitled to qualified "good faith" immunity.[1] The Court rejected petitioner's contentions (a) that the defense of "good faith" is limited to officeholders in their individual capacities and does not extend to governmental entities, (b) that qualified immunity does not forbid the granting of equitable relief, and (c) that qualified immunity does not justify refusal to issue a declaratory judgment. Rehearing and rehearing *en banc* were denied by a vote of five to two.

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1. Paradoxically the Court concluded that, prior to *Roth* and *Sindermann*, the City could not have known that its actions violated Owen's rights despite recognizing that:

> "Before Owen's discharge, the Supreme Court appeared to find a liberty interest '[w]here a person's good name, reputation, honor, or integrity [was] at stake because of what the government [was] doing to him,' which, when infringed, required the Government to provide the individual with notice and an opportunity to be heard. *Wisconsin* v. *Constantineau*, 400 U.S. 433, 437, 91 S.Ct. 507, 510, 27 L.Ed.2d 515 (1971). However, not until the *Roth* and *Sindermann* cases did the Court first recognize that a public employee, in the context of being terminated under circumstances imposing a stigma on his professional reputation and impairing his ability to find future employment, was entitled to notice and a name-clearing hearing."

The City Council of Independence did not need to be aware of subsequent decisions of this Court to know that its official actions would seriously damage Owen's "good name, reputation, honor and integrity."

REASONS FOR GRANTING THE WRIT

I

The Decision Below Erred in Its Resolution of an Important and Recurring Issue Significantly Affecting the Administration of Justice—Whether Qualified Immunity Should Be Extended to Local Governmental Bodies.

The question raised in the present case is whether the qualified immunity available to local officials under *Wood* v. *Strickland*, 420 U.S. 308 (1975) is to be extended to cover local governmental bodies sued directly. In *Monell*, this Court expressly deferred ruling on the issue because it had not been briefed by the parties nor discussed by the lower courts. It remains an important question which has not been, but should be, settled by this Court.

Resolution of the issue posed in this petition will significantly clarify enforcement of constitutional rights through 42 U.S.C. §1983. The substantial number of §1983 cases need hardly be emphasized.[2] Faced with this case load, the District Courts need early and definitive guidance on the difficult question left for another day in *Monell* —whether qualified immunity extends to local governmental bodies as well as to local officials. In the end, the question can be answered only by this Court. Delay in providing the answer will lead, at best, to further protraction of litigation in the already overburdened District Courts. At worst, it will lead to unjust results and unnecessary retrials.

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2. Private cases classified as "Civil Rights—Other Civil Rights" or as "Prisoner Petitions—Civil Rights" represented more that 11% of all civil filings for the year ending June 30, 1978. Administrative Office of the United States Courts, *1978 Annual Report of the Director* at A16-A17 (1978).

The importance of resolving this question is underlined by the decision below which misconstrues §1983 and *Monell*. The considerations which led this Court to grant qualified immunity to local officials have no validity if applied to suits brought directly against local governments. Public treasury liability will not deter the most capable candidates from seeking public office. *Cf., Birnbaum* v. *United States*, 588 F.2d 319 (2nd Cir. 1978). It will not cause undue timidity in decision making. *Carter* v. *Carlson*, 447 F.2d 358, 367 (D.C. Cir. 1971), *rev'd on other ground sub nom., District of Columbia* v. *Carter*, 409 U.S. 418 (1973). Rather it insures that the public as a whole, which receives the benefits of governmental policies, bears the costs of unconstitutional ones. Denying public treasury liability places the entire cost of a constitutional tort on the innocent victim. Moreover, immunity from suit for violations of all rights which have not already been recognized destroys the incentive for litigation leading to the recognition of new rights.[3]

One aspect of the Court of Appeals' opinion could, if upheld, have unfortunate consequences far beyond the area of §1983.

This Court has repeatedly exercised its salutary power to note the existence of an issue and yet to defer ruling on it. *E.g., Mt. Healthy City Board of Education* v. *Doyle*, 429 U.S. 274, 279 (1977); *In re Primus*, 436 U.S. 412, 440 (1978) (Justice Blackmun, concurring); *Robertson* v. *Wegmann*, 436 U.S. 584, 594 (1978). The Court did so in *Monell* by going out of its way to state that it expressed no view on qualified municipal immunity. 436 U.S. at 701. The power to reserve ruling on an issue permits this Court to observe

3. This is particularly true, if, as in the present case, the immunity is extended to bar equitable relief, declaratory judgments and attorney's fee awards.

the constitutional limitation that it decide only cases and controversies presented to it and the prudential rule that it not decide issues which have not been briefed and argued by the parties or addressed by the lower courts. It can serve those functions only if the lower courts recognize that this Court's postponing ruling on an argument does not imply that the argument has merit. In the present case, the Court of Appeals failed to do so. Instead, it treated *Monell's* deferral of the qualified immunity issue as a final determination that qualified immunity was a valid defense, stating "We imply from the Court's discussion of immunity that local governing bodies may assert a limited immunity defense to actions brought against them under section 1983." (App. at A4-A5) It apparently felt that the "ruling" it inferred required it to disregard its own previous conclusion that the primary justifications for immunity did not exist in suits against public entities. (App. at A39)

II

The Decision Below Conflicts With Decisions of Other Courts of Appeal on Whether Local Governmental Bodies—As Opposed to Local Officials—May Assert a "Good Faith" Defense to Suits Under 42 U.S.C. §1983.

The decision below conflicts with decisions in three other circuits which have ruled that the good faith immunity of *Wood* v. *Strickland* does not extend to cover local governmental bodies. In *Hander* v. *San Jacinto Junior College*, 519 F.2d 273, 277 at n. 1 (5th Cir. 1975), *aff'd per curiam on rehearing*, 522 F.2d 204 (5th Cir. 1975), the defendants argued that, under *Wood*, good faith precluded any award. The Fifth Circuit rejected that argument and affirmed the award stating:

"The *Wood* rationale, however, is inapplicable to the instant case because the backpay award is entered against San Jacinto Junior College itself and not against the individual members of the Board of Regents."

Similarly, in *Hostrop* v. *Board of Junior College District No. 515*, 523 F.2d 569 (7th Cir. 1975), *cert. denied*, 425 U.S. 963 (1976), the Seventh Circuit held that the good faith immunity of a school board's members did not protect the board as an entity from liability for damages resulting from a procedurally deficient discharge.

The Fourth Circuit has taken the same position. In *Bursey* v. *Weatherford*, 528 F.2d 483, 488 at n. 8 (4th Cir. 1975), *rev'd on other grounds*, 429 U.S. 545 (1977), the Court of Appeals instructed the lower court that, in a suit against the individual defendants in their official capacities, ". . . the defense that they acted in good faith is inapplicable." Similarly, in *Thomas* v. *Ward*, 529 F.2d 916 (4th Cir. 1975), *disapproved as to measure of damages, Carey* v. *Piphus*, 435 U.S. 247 (1978), it held that back pay could be awarded against administrators and school board members in their official capacity even though their good faith barred such an award against them in their individual capacities.

The Eighth Circuit's opinion also conflicts with its own pre-*Monell* decisions. In *Wellner* v. *Junior College Board*, 487 F.2d 153 (8th Cir. 1973) and in *Cooley* v. *Board of Education of Forrest City School District*, 453 F.2d 282, 287 (8th Cir. 1972), the Court had awarded back pay against school boards without regard to good faith.

The Court of Appeals for the Tenth Circuit is presently considering the issue *en banc*. *Bertot* v. *School District No. 1, Albany County, Wyoming*, No. 76-1159 (Argued May 15, 1979).

III

The Decision Below Misinterprets §1983 by Denying Equitable and Declaratory Relief and by Denying Petitioner Attorneys Fees.

The Court of Appeals previously held, *inter alia*, "Owen is entitled to a declaratory judgment that his discharge from employment deprived him of constitutionally protected liberty without due process of law." (App. at A41) The present panel decision agreed that Petitioner had been deprived of liberty without due process. (App. at A3) However, without discussion, it failed to grant Petitioner a declaratory judgment to that effect and to remand for determination of attorneys fees. (App. at A7)

Since the Court of Appeals has twice held that Petitioner's rights have been violated, Petitioner knows no basis or authority for its refusal to order the entry of a declaratory judgment to that effect. *Cf. Carey* v. *Piphus*, 435 U.S. 247, 252 (1978). In a case such as this, in which Petitioner's good name, reputation and honor are at stake, a declaratory judgment is important for its own sake. Moreover, it would permit Petitioner to recover his attorneys fees under the Civil Rights Attorneys' Fees Awards Act of 1976 and this Court's decision in *Hutto* v. *Finney*, 437 U.S. 678 (1978).

The decision below also held that qualified immunity stood as a bar, not only to damages, but also to the Petitioner's claims for equitable relief. (App. at A5-A6) This holding represented a complete reversal of the Court of Appeals' previous position that "The good faith of the municipality does not constitute a defense to monetary relief as an element of equitable relief." (App. at A38-39) It was a drastic departure from previous holdings. *E.g., Strickland* v. *Inlow*, 485 F.2d 186, 190 (8th Cir. 1973) ("Good faith is

a defense in damage actions, but not in actions for equitable relief."), *position on immunity sustained sub nom., Wood* v. *Strickland,* 420 U.S. 308, 314-315 n. 6 (1975) ("immunity from damages does not ordinarily bar equitable relief as well.") On remand, the *Wood* plaintiffs were held entitled to equitable relief clearing their records regardless of any claim of good faith. Restitution in the form of back pay (or its lesser monetary equivalent) has consistently been held to be an incident to equitable relief. *N.L.R.B.* v. *Jones & Laughlin Steel Corporation,* 301 U.S. 1, 47-48 (1937).

Sustaining a holding that "good faith" bars declaratory and equitable relief as well as damages would effectively eliminate incentives to test the constitutionality of any governmental action not previously declared unconstitutional. It would reduce most pioneering constitutional litigation to a request for an advisory opinion since no relief could be granted.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 76-1758

George D. Owen,
Appellant,

v.

The City of Independence, Missouri, Lyle W. Alberg, City Manager, Richard A. King, Mayor, Charles E. Cornell, Dr. Ray Williamson, Dr. Duane Holder, Ray A. Heady, Mitzi A. Overman, and E. Lee Comer, Jr., Members of the Council of the City of Independence, Missouri,
Appellees.

No. 76-1799

George D. Owen,
Appellee,

v.

The City of Independence, Missouri, Lyle W. Alberg, City Manager, Richard A. King, Mayor, Charles E. Cornell, Dr. Ray Williamson, Dr. Duane Holder, Ray A. Heady, Mitzi A. Overman, and E. Lee Comer, Jr., Members of the Council of the City of Independence, Missouri,
Appellants.

Appeals From the United States District Court
for the Western District of Missouri.

OPINION ON REMAND

Filed: December 1, 1978

Before VAN OOSTERHOUT, Senior Circuit Judge; BRIGHT and ROSS, Circuit Judges.

BRIGHT, Circuit Judge.

In *Owen* v. *City of Independence, Mo.*, 560 F.2d 925 (8th Cir. 1977), this court, relying on *Monroe* v. *Pape*, 365 U.S. 167 (1961), determined that appellant George D. Owen could not bring an action under 42 U.S.C. § 1983 (1970) against the City of Independence because it was not a "person" within the meaning of that statute, but that the municipality was subject to suit under an implied right of action arising directly from the fourteenth amendment of the Constitution. The Supreme Court granted the petition for writ of certiorari by the City of Independence, vacated the judgment, and remanded the case to us "for further consideration in light of *Monell* v. *Dept. of Social Services of the City of New York*, 436 U.S. ....., 98 S.Ct. 2018, 56 L.Ed2d ..... (1978)." *City of Independence, Missouri* v. *Owen*, ... U.S. ....., 98 S.Ct 3118 (1978). *Monell* modified *Monroe* v. *Pape* and permits section 1983 actions against local governing bodies.

On this remand we consider these questions: (1) under *Monell, supra*, does Owen demonstrate that official municipal policy deprived him of constitutional rights, in violation of section 1983; and (2) under the particular circumstances of this case with the narrow issue presented, is the City immune from damages. We answer both questions affirmatively. Our decision upon the second question requires a dismissal of the action.

1. Section 1983 Action.

The pertinent facts are set forth in our prior opinion. *Owen, supra* at 927-31. In *Monell*, the Supreme Court held that municipalities and other local government units could be sued as "persons" under section 1983 when

> the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. [*Monell, supra* at ....., 98 S.Ct. at 2036.]

The Court determined that congressional intent permitted municipalities to be held liable when "action pursuant to official municipal policy of some nature caused a constitutional tort." *Id.* Although the language of section 1983 has not been read to impose vicarious liability on municipalities solely for the misdeeds of their employees, *Monell* makes clear that "when execution of a government's policy or custom [is] made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, [and it] inflicts the injury * * * the [municipality] as an entity is responsible under § 1983." *Monell, supra* at ....., 98 S.Ct. at 2038.

Turning to the application of *Monell* to the facts of this case, we noted in our prior opinion that the actions of the City of Independence deprived Owen of his constitutional right to liberty. *Owen, supra* at 934-37. The City stigmatized Owen when it reinforced councilman Roberts' allegedly slanderous charges of August 1972 by directing that an investigative report alleging misconduct in the police department be referred to the county prosecutor for presentation to the grand jury. In addition, after the city manager terminated Owen's employment as police chief he publicly announced the referral of the investiga-

tive reports concerning police department inefficiencies to the county prosecutor for further action. The city charter of Independence did not entitle the police chief to a name-clearing hearing in connection with his discharge, and Owen was not given one. We conclude that the stigma attached to Owen in connection with his discharge was caused by the official conduct of the City's lawmakers, or by those whose acts may fairly be said to represent official policy. Such conduct amounted to official policy causing the infringement of Owen's constitutional rights, in violation of section 1983.

A post-*Monell* interpretation of section 1983 permits Owen to sue the City of Independence directly and, therefore, we find it unnecessary to rely on the *Bivens* doctrine as we did in our previous opinion. By enacting section 1983, Congress has provided an appropriate and exclusive remedy for constitutional violations committed by municipalities. Consequently, no reason exists to imply a direct cause of action under the fourteenth amendment.

II. Immunity.

In the particular circumstances of this civil rights action, we hold that the City of Independence is entitled to qualified immunity from liability.

The Supreme Court decided in *Monell* that municipal bodies sued under section 1983 are not protected by absolute immunity. However, both the Court's majority and Mr. Justice Powell's concurring opinion indicate that even after *Monell*, municipalities may have some limited immunity in section 1983 cases, the boundaries of which are yet to be defined. *Monell, supra* at ....., 98 S.Ct. at 2038, 2041, 2044, 2047. We imply from the Court's discussion of immunity that local governing bodies may assert a

limited immunity defense to actions brought against them under section 1983.

In the instant case, Owen contended that he possessed a property interest in continued employment as police chief and, upon being discharged, demanded a due process hearing. In our prior opinion we rejected Owen's contention relating to an alleged property interest. *Owen, supra* at 937-38.

Regarding the liberty interest, we previously decided that the municipal employer, in connection with the termination of Owen as the police chief of Independence, in effect made a "charge" which might seriously damage Owen's standing and reputation in the community. *Owen, supra* at 935-37. That is, "[t]he fact of actual stigma to Owen *connected with his discharge* is undeniable, for the action of the City of Independence as employer served to blacken Owen's name and reputation." *Owen, supra* at 937. In addition, the City of Independence did not provide Owen with a hearing to vindicate his name. Accordingly, we held that the action of the City of Independence deprived Owen of a liberty interest without due process of law.

The district court, however, as an alternative ground for denying Owen relief, determined that the individual defendants established a good faith defense to Owen's charges by demonstrating that they could not reasonably have known of any obligation to afford Owen a name-clearing hearing and that they acted without malice in not providing such a hearing. *Owen* v. *City of Independence, Mo.*, 421 F. Supp. 1110, 1117-18 (W.D. Mo. 1976), *modified*, 560 F.2d 925 (8th Cir. 1977). In our prior opinion we recognized the probable applicability of the good faith defense to a claim for damages, while we rejected its

use in an action where backpay is an element of the equitable relief sought, as in the instant case. *Owen*, 560 F.2d at 940. *Monell* undermined such a distinction when the Supreme Court answered in the affirmative the following query raised by the grant of certiorari:

> "Whether local governmental officials and/or local independent school boards are 'persons' within the meaning of 42 U.S.C. § 1983 when equitable relief in the nature of back pay is sought against them in their official capacities?" [*Monell* v. *Dept. of Social Services of the City of New York*, 436 U.S. ....., 98 S.Ct. 2018, 2021 (1978).]

That answer, in light of the immunity discussion in *Monell*, suggests that a limited immunity defense will apply to claims for equitable relief against municipalities.

The Supreme Court's decisions in *Board of Regents* v. *Roth*, 408 U.S. 564 (1972) and *Perry* v. *Sindermann*, 408 U.S. 593 (1972), crystallized the rule establishing the right to a name-clearing hearing for a government employee allegedly stigmatized in the course of his discharge. The Court decided those two cases two months after the discharge in the instant case. Thus, officials of the City of Independence could not have been aware of Owen's right to a name-clearing hearing in connection with the discharge.[1] The City of Independence should not be

1. Before Owen's discharge, the Supreme Court appeared to find a liberty interest "[w]here a person's good name, reputation, honor, or integrity [was] at stake because of what the government [was] doing to him," which when infringed, required the Government to provide the individual with notice and an opportunity to be heard. *Wisconsin* v. *Constantineau*, 400 U.S. 433, 437 (1971). However, not until the *Roth* and *Sindermann* cases did the Court first recognize that a public employee, in the context of being terminated under circumstances imposing a stigma on his professional reputation and impairing his ability to find future employment, was entitled to notice and a name-clearing hearing.

charged with predicting the future course of constitutional law. *See Wood* v. *Strickland*, 420 U.S. 308, 322 (1975); *Pierson* v. *Ray*, 386 U.S. 547, 557 (1967); *Sullivan* v. *Meade Independent School District No. 101*, 530 F.2d 799, 806 (8th Cir. 1976). We extend the limited immunity the district court applied to the individual defendants to cover the City as well, because its officials acted in good faith and without malice. We hold the City not liable for actions it could not reasonably have known violated Owen's constitutional rights.

Accordingly, our prior opinion, *Owen* v. *City of Independence, Mo.*, 560 F.2d 925 (8th Cir. 1977), stands modified by this supplemental opinion on remand. Based on both this and our previous opinion, we affirm the judgment of the district court denying Owen any relief against the defendants in this case.

VAN OOSTERHOUT, Senior Circuit Judge, specially concurring.

I fully concur in the result and the basic reasoning supporting the affirmance in the majority opinion. I still adhere to my view expressed in my dissent in the former appeal at 560 F.2d 925, 941, and consider it an alternate basis for affirmance.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 76-1758

George D. Owen,
Appellant,

v.

The City of Independence, Missouri, Lyle W. Alberg, City Manager, Richard A. King, Mayor, Charles E. Cornell, Dr. Ray Williamson, Dr. Duane Holder, Ray A. Heady, Mitzi A. Overman, and E. Lee Comer, Jr., Members of the Council of the City of Independence, Missouri,
Appellees.

No. 76-1799

George D. Owen,
Appellee,

v.

The City of Independence, Missouri, Lyle W. Alberg, City Manager, Richard A. King, Mayor, Charles E. Cornell, Dr. Ray Williamson, Dr. Duane Holder, Ray A. Heady, Mitzi A. Overman and E. Lee Comer, Jr., Members of the Council of the City of Independence, Missouri,
Appellants.

Appeals from the United States District Court for the Western District of Missouri

Submitted: March 16, 1977
Filed: August 15, 1977

Before VAN OOSTERHOUT, Senior Circuit Judge; BRIGHT and ROSS, Circuit Judges.

BRIGHT, Circuit Judge.

Following his discharge in April 1972 as chief of police of Independence, Missouri, appellant George D. Owen filed this civil action against the City of Independence, city manager Lyle W. Alberg, and the present members of the city council in their official capacities.[1] Owen seeks a declaration that his discharge violated his constitutional right to due process, and prays for a mandatory injunction reinstating[2] him as chief of police with backpay. After a bench trial, the district court held that Owen could assert a claim against the City and its council members in their official capacities arising directly from the fourteenth amendment under the general federal question jurisdiction statute, 28 U.S.C. §1331, but the court denied Owen relief on the merits. Owen appeals. Appellees cross-appeal, asserting that the City and the individual defendants are not amenable to suit under 28 U.S.C. §1331 and the fourteenth amendment. The district court opinion is reported at 421 F. Supp. 1110 (W.D. Mo. 1976). For reasons stated below, we affirm on the City's cross-appeal and reverse and remand on Owen's appeal.

The district court's findings of fact, quoted in part below, furnish the background needed for understanding the issues presented here:

1. These council members replaced those serving on the city council at the time of Owen's discharge.

2. The claim for actual reinstatement has been abandoned (but not the backpay element of a reinstatement remedy) because Owen reached the mandatory retirement age of sixty-five during the course of the litigation in district court.

I.

Findings of Fact.

Plaintiff is, and at all times material was, a citizen of the United States and a resident of the State of Missouri.

Defendant City is a municipal corporation organized and existing under the laws of the State of Missouri. The City's government is organized in the council-manager form pursuant to a Missouri Constitutional Home Rule city charter adopted December 5, 1961, and amended April 4, 1972.

Defendant Lyle W. Alberg is the duly appointed and acting City Manager and Chief Administrative Officer of the City.

Defendant Richard A. King is the duly elected and acting Mayor of the City and a member of the City Council. He is the successor of Phil K. Weeks who was, on April 17, 1972, and prior thereto, the City's Mayor.

Defendants Charles E. Cornell, Dr. Ray Williamson, Dr. Duane Holder, Ray A. Heady, Mitzi A. Overman, and E. Lee Comer, Jr., are the duly elected and acting members of the City Council of the City. They are the successors of William A. McGraw, Lauzon H. Maxwell, Arthur W. Lamb, R. M. "Rudy" Bonville, Morris D. McQuinn and Paul L. Roberts who were the members of the City Council on April 17, 1972, and prior thereto.

Under Section 3.3(1) of the City's Charter, the City Manager is vested with the sole power to

> "[a]ppoint, and when deemed necessary for the good of the service, lay off, suspend, demote, or remove all directors, or heads of administrative departments and all other administrative officers and employees of the city. . . ."

Plaintiff, as Chief of Police, was subject to this provision. The Charter did not provide that the Chief of Police was entitled to any notice of reasons, or a hearing, in connection with the termination of his employment.

The City Council, and its members, are prohibited from influencing, or interfering with in any manner, the City Manager's power of appointment and discharge of City employees. Section 2.11 of the City Charter provides that:

> "[n]either the council, the mayor, nor any of its other members may direct the appointment of any person to, or his removal from office or employment by the city manager or by any other authority, or, except as provided in this charter, participate in any manner in the appointment or removal of officers and employees of the city. Except for the purpose of inquiry, the council, the mayor, and its other members shall deal with the administrative service solely through the city manager. . . . If the mayor or any other councilman violates any provision of this section, he shall be guilty of a misdemeanor, and upon conviction thereof, shall cease to be a councilman. . . ."

On February 20, 1967, plaintiff was appointed Chief of Police of the City for an indefinite term by then City Manager Robert L. Broucek. Prior to that time, he had served as an assistant to the Chief of Police of Kansas City, Missouri. Plaintiff was given no contract of employment, and there was no *de facto* tenure system which would have given him a reasonable or legitimate expectation of continued employment. Plaintiff served as Chief of Police until his employment was terminated effective April 19, 1972, by notice in writing of April 18, 1972, by the present City Manager Lyle W. Alberg.

For a substantial period of time prior to March, 1972, plaintiff and City Manager Albert (sic) had had several sharp disagreements over plaintiff's administration of the Police Department, including but not limited to plaintiff's choice of people for positions in the Department and his administration of the Police Department's property room. In early March, 1972, a handgun, which had been destroyed according to records of the Department's property room, was discovered in the hands of a felon by Kansas City, Missouri, police. In about mid-March, 1972, City Manager Alberg initiated an investigation of the property room of the Police Department initially under plaintiff's direction. Later in March, 1972, Alberg decided that the investigation should be conducted by an independent branch of the city government. He transferred the two police officers who had begun the investigation, Sergeant Robert Jackson and Detective William Reynolds, to the City's Department of Law; and directed City Counselor James S. Cottingham who was head of the Department of Law to supervise the conduct of the investigation and to report the findings of the investigation directly to him.

On or before April 12, 1972, City Manager Albert received copies of statements of witnesses secured in the investigation, and reports from the City Auditor and City Counselor Cottingham. The City Auditor reported that there were insufficient records in the Police Department property room to make an adequate audit of the property in the property room. Cottingham reported in writing to Alberg that there was no evidence of any criminal acts, or violation of any state law or municipal ordinances, in the administration of the property room.

At an informal meeting with several of the City Council members, which took place on or before April 10, 1972, City Manager Alberg discussed the investi-

gation and told the City Council members that he would take action at an appropriate time to correct any problems in administration of the Police Department disclosed by the investigation. At that time, Alberg intended to keep the witness statements and details of the findings of the investigation confidential.

On April 10, 1972, Alberg communicated by telephone with plaintiff, who was then on vacation in Las Vegas, Nevada. Alberg told plaintiff he was dissatisfied with plaintiff's job performance, and asked plaintiff to resign as Chief of Police and accept another position in the Police Department. He told plaintiff that if he refused to accept another position in the Department, he would be discharged. Plaintiff requested a personal conference with Alberg in Independence the following day.

On April 11, 1972, Alberg and plaintiff met in Alberg's office in Independence. Alberg stated to plaintiff that he was dissatisfied with plaintiff's administration of the Police Department, including plaintiff's lack of supervision over the records section of the Department; the state of those records, and plaintiff's inadequate administration, and lack of control, of the property room which had resulted in the reappearance of supposedly destroyed property in the hands of other people. Alberg again requested plaintiff to resign as Chief of Police, and to accept an advisory position with the Police Department. Plaintiff responded that he was not interested in another position, and that he would fight to remain Chief of Police. Alberg told plaintiff that if he continued to refuse to take another position, his employment with the City would be terminated.

On April 13, 1972, Alberg had a discussion with Lieutenant Lawrence L. Cook of the Police Depart-

ment, during which he asked Cook if he would be willing to take the position of Chief of Police. Cook stated that he would. On the same day, Alberg released a public communication to the Mayor and City Council concerning the investigation and audit of the Police Department's property room, which stated:

> "At my direction, the City Counselor's office, on conjunction with the City Auditor have completed a routine audit of the police property room.
>
> "Discrepancies were found in the administration, handling and security of recovered property. There appears to be no evidence to substantiate any allegations of a criminal nature.
>
> "Steps have been initiated on an administrative level to correct these discrepancies."

Alberg's statement was prominently reported by a local newspaper.

Alberg was away from Independence on the weekend of April 15 and 16, 1972. On April 15, he decided to replace plaintiff with Lieutenant Cook as Chief of Police. However, he did not inform anyone of his decision, and did not take formal action to implement his decision until April 18, 1972.

In Alberg's absence, Assistant City Manager Parley Banks became the Acting City Manager. During the weekend, City Councilman Paul L. Roberts requested copies of the reports of the audit and statements of witnesses secured in the investigation of the Police Department property room. Roberts had recently been defeated for reelection to the City Council, and his term was to expire following the meeting of the City Council on the evening of April 17, 1972. Banks, unaware of Alberg's intention to keep the details of the reports confidential, complied with Roberts' request and delivered the documents to Roberts without reading them.

During the weekend Roberts read the reports and unilaterally decided that their contents should be made public. He secretly drafted a statement to be made by him without prior notice to anyone, at the City Council meeting on the evening of April 17, 1972. The statement is described below.

An informal meeting was held on the morning of April 17, 1972, between Alberg and four members of the City Council, during which the investigation of the Police Department was again discussed. At that time, Alberg did not inform the council members of his intention to discharge plaintiff; and Councilman Roberts did not disclose his intention to make a statement concerning the investigation at the formal meeting of the City Council that evening.

On the evening of April 17, 1972, the City Council held a regularly scheduled meeting. The agenda of the meeting did not list a statement or motion by Councilman Roberts. After completion of the scheduled business, Councilman Roberts read his prepared statement. The statement alleged that plaintiff had taken two television sets from the property room of the Police Department for his own personal use; that numerous firearms in the custody of the Police Department had ". . . found their way into the hands of others including undesirables. . ."; that narcotics being held by the Department ". . . have mysteriously disappeared"; that traffic tickets had been manipulated; that inappropriate requests had been made by "high ranking police officials to the police court"; ". . . that things have occurred causing the unusual release of felons"; and the reports disclosed "gross inefficiencies on the part of a few of the high ranking officers of the police depart-

ment." Councilman Roberts then moved that the reports be made public; that they be turned over to the Prosecuting Attorney of Jackson County; and that the City Council recommend to the City Manager

> ". . . that he should take all direct and appropriate action permitted under the Charter against such persons as are shown by the investigation to have been involved in illegal, wrongful, or gross inefficient activities brought out in the investigative reports, and to complete the investigation."

* * * After discussion of Councilman Roberts' motion, six members of the Council voted to approve the motion. Councilman McGraw abstained from voting on the motion.

On April 18, 1972, City Manager Alberg implemented his prior decision to discharge plaintiff as Chief of Police.

> On that day plaintiff received a written notice from Albert stating merely that his employment as Chief of Police was "[t]erminated under the provisions of Section 3.3(1) of the City Charter" effective April 19, 1972. Plaintiff requested that Alberg provide him with written notice of the reasons for the termination and a hearing in a letter to Alberg dated April 15, 1972. The letter was not received by Alberg until after plaintiff's discharge. Both the action of the City Council and plaintiff's discharge by City Manager Alberg were prominently reported in local newspapers.
>
> After termination of plaintiff's employment, Alberg referred the investigation reports and statements to the Prosecuting Attorney of Jackson County, Missouri, for consideration by a grand jury as recommended by the City Council. The grand jury subsequently returned a "no true bill." Since

> that time, neither City Manager Alberg nor the City Council made any further investigation of plaintiff's administration of the Police Department.
>
> In April 1972, plaintiff's attorney requested a hearing on the reasons for plaintiff's discharge. The request was denied by Assistant City Counselor James Gillham by a letter to plaintiff's counsel dated May 3, 1972. [*Owen* v. *City of Independence, Mo.*, 421 F. Supp. 1110, 1113-17 (W.D. Mo. 1976).]

The district court found no causal relationship between councilman Roberts' statement, as supported by the city council's resolution, and the termination of Owen's employment. The record shows, and the district court found, that city manager Alberg did not subscribe to Roberts' accusations and that Alberg publicly stated in his April 13, 1972, report to the city council that, although the investigation uncovered evidence of inefficiency in administration of the police department, no evidence of any criminal activity existed.

The district court also found that when Owen was discharged neither the members of the city council nor the city manager knew that a municipal employee discharged in the face of allegations of improper or immoral conduct was entitled to receive notice of the reasons for discharge and an opportunity to clear his name at a hearing.[3].

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3. As the district court noted:

> The United States Supreme Court first recognized that a public employee, who was discharged under circumstances imposing a "stigma" on his professional reputation and injuring his ability to find employment in the future, was entitled to notice and a hearing to clear his name in *Board of Regents* v. *Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L.Ed.2d 548 (1972), and *Perry* v. *Sindermann*, 408 U.S. 593, 92 S. Ct. 2694, 33 L.Ed.2d 570 (1972). These cases were decided on June 29, 1972, more than two months after plaintiff's discharge. [*Owen* v. *City of Independence, Mo., supra*, 421 F. Supp. at 1118.]

Owen did not join former councilman Roberts in this lawsuit. He did, however, bring an action in the Missouri courts seeking damages for defamation against Roberts and city manager Alberg in their individual capacities. Owen settled and dismissed his case against Roberts, and thereafter also dismissed the state suit against Alberg.

The federal district court determined that Owen's procedural due process claims against the City and its officials for their failure to give Owen a hearing on his discharge could rest directly upon the fourteenth amendment and that Owen could bring such an action in federal court against the City of Independence and its officials in their official capacities under 28 U.S.C. § 1331. The district court determined, however, that the discharge deprived Owen of no property interest in his job because he was an untenured employee, and that the action of the City in discharging Owen did not so stigmatize him as to deprive him of "liberty" protected by the fourteenth amendment. As an alternative ground for denying Owen relief, the district court ruled that the City could assert a qualified immunity based on the good faith exercised by its officials in denying Owen a hearing.[4] The district court found that the City had established this defense because, as we have already noted, on the date of Owen's discharge neither the city manager nor the members of the city council knew that the chief of police, an untenured administrative official of the City, possessed any right to a statement of reasons for his discharge and an opportunity for a hearing to clear his name.

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4. The district court reasoned that the individual officials sued in their official capacities had no greater claim to good faith immunity than the City itself because any award against the officials would be paid from municipal funds. 421 F. Supp at 1123.

The parties present these issues on appeal:

By appellees:

1) That 28 U.S.C. § 1331[5] does not support a claim against the City of Independence and its officials in their official capacities arising directly from the Constitution.[6]

By appellant:

2) That the district court erred in ruling that Owen's discharge did not deprive him of a liberty interest without an opportunity for hearing.

3) That the trial court erred in determining that Owen possessed no job tenure rights under Missouri law and thus suffered no deprivation of property when discharged.

4) That the trial court erred in applying a good faith defense to claims against the City and its agents in their official capacities. In this regard, appellant particularly notes that good faith does not bar equitable relief which ordinarily includes backpay as an incident of reinstatement.

We turn to a consideration of these issues.

---

5. That section in relevant part reads:

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

6. Appellees phrase the issue in terms of subject matter jurisdiction. Properly viewed, however, the issue is whether Owen has stated a claim. Clearly, Owen's claim "arises under" the Constitution or laws of the United States, and is not completely baseless or plainly foreclosed by prior decisions. Thus, 28 U.S.C. § 1331 affords a federal district court subject matter jurisdiction over cases such as this one. *See, e.g., Mt. Healthy City School Dist. Bd. of Ed.* v. *Doyle*, 97 S. Ct. 568, 572 (1977); *Bell* v. *Hood*, 327 U.S. 678 (1946).

I. *Right of Action Against the City.*

Assuming a constitutional violation, the City and its agents in their official capacities contend that federal law precludes any monetary award which must be satisfied by the City.

Although Owen's complaint alleges jurisdiction under 28 U.S.C. § 1343(3) and (4) and 42 U.S.C. § 1983 (as well as 28 U.S.C. § 1331), it is clear that no action lies against the municipality under sections 1343(3) and (4) and 1983, because the City is not a "person" within the meaning of section 1983. *City of Kenosha* v. *Bruno,* 412 U.S. 507 (1973); *Monroe* v. *Pape,* 365 U.S. 167 (1961). Owen asserts, however, that his claim to retrospective monetary relief is not barred under either of two theories: (1) the individual defendants, in their official capacities, may be ordered under section 1983 to grant Owen a hearing and backpay from city funds under their control; or (2) the City is subject to suit for reinstatement and backpay under an implied right of action arising directly from the fourteenth amendment, and the district court possessed subject matter jurisdiction over that claim under 28 U.S.C. § 1331.

The individual defendants are, both in their official and individual capacities, "persons" under section 1983, subject to federal suits in equity to remedy unconstitutional behavior. It is also true that in section 1983 actions against government administrators, monetary relief in the form of backpay to be awarded from public funds under the defendants' control may be awarded as part of an equitable decree. *See, e.g., Wellner* v. *Minnesota State Junior College Board,* 487 F.2d 153, 156-57 (8th Cir. 1973); *Cooley* v. *Board of Education of Forrest City School Dist.,* 453 F.2d 282 (8th Cir. 1972). Owen argues that he may recover backpay from the individual appellees in their official capacities as part of general equitable relief, even though the backpay

award would be paid by the City, which could not be held directly liable for backpay under section 1983, because it is not a "person" within the meaning of section 1983. This position has some support. *See, e.g., Lytle* v. *Commissioners of Election of Union County,* 541 F.2d 421, 426 (4th Cir. 1976), *pet. for cert. filed,* 44 U.S.L.W. 3739 (U.S. June 22, 1976); *Burt* v. *Board of Trustees of Edgefield County School Dist.,* 521 F.2d 1201, 1205-06 (4th Cir. 1975); *Incarcerated Men of Allen County Jail* v. *Fair,* 507 F.2d 281, 288 (6th Cir. 1974); *Dyson* v. *Lavery,* 417 F. Supp. 103, 109 (E.D. Va. 1976); *Adamian* v. *University of Nevada,* 359 F.2d 825 (D. Nev. 1973), *rev'd on other grounds sub nom. Adamian* v. *Jacobsen,* 523 F.2d 929 (9th Cir. 1975); *Developments in the Law: Section 1983 and Federalism,* 90 Harv. L. Rev. 1133, 1197-99 (1977).

Other courts have rejected this theory, however. They argue that a monetary award under section 1983, even if made part of equitable relief ordered in a suit against a city official, is really a judgment against the city, if the award is to be satisfied from city funds, and is therefore barred by *City of Kenosha* v. *Bruno, supra,* and *Monroe* v. *Pape, supra.* These cases draw an analogy to *Edelman* v. *Jordan,* 415 U.S. 651 (1974), which held that a request for retroactive welfare benefits, even if entitled "equitable restitution" and made part of an equitable decree in a suit against a state official, is in reality a suit against the state barred by the eleventh amendment if the retroactive benefits are to be paid from the state treasury. *See, e.g., Monell* v. *Department of Social Services of City of New York,* 532 F.2d 259, 264-67 (2d Cir. 1976), *cert. granted,* ..... U.S. ....., 97 S. Ct. 807 (1977) (No. 75-1914); *Muzquiz* v. *City of San Antonio,* 528 F.2d 499 (5th Cir. 1976) (*en banc*), *pet. for cert. filed,* 44 U.S.L.W. 3703 (U.S. May 23, 1976) (No. 75-1723); *Patton* v. *Conrad Area School Dist.,* 388 F. Supp. 410

(D. Del. 1975).[7] This analogy is criticized in *Developments in the Law: Section 1983 and Federalism, supra,* 90 Harv. L. Rev. at 1198-99.

However, we need not choose between the conflicting approaches to Owen's claims that he may obtain monetary relief from the City through the individual city officials in their official capacities under section 1983, because we are convinced that Owen has established a claim on his second theory, that of an implied right of action arising from the Constitution itself.

Bivens v. *Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971), clearly recognized that a federal "court of law vested with jurisdiction over the subject matter of a suit has the power—and therefore the duty—to make principled choices among traditional judicial remedies" to vindicate rights arising from positive law, such as the Constitution, without express congressional authorization. 403 U.S. at 408 n.8 (Harlan, J., concurring). We are confronted with the fundamental questions of whether the remedies Owen seeks against the City of Independence are available as "necessary" or "appropriate" to the vindication of fourteenth amendment values, *see Bivens, supra,* 403 U.S. at 397; *id.* at 406 (Harlan, J., concurring), and whether Congress has expressly decided that a person injured by a municipal violation of the Constitution may not recover money from the city but must be

7. These holdings are not necessarily inconsistent with our cases awarding backpay to be paid by school districts, *e.g., Wellner* v. *Minnesota State Junior College Bd., supra,* 487 F.2d 153; *Cooley* v. *Board of Educ. of Forrest City School Dist., supra,* 453 F.2d 282. The parties in these cases did not question the school boards' status as "persons" under section 1983. In at least one case, we have assumed that school boards are "persons" suable under section 1983, *Keckeisen* v. *Independent School District 612,* 509 F.2d 1062, 1064-65 (8th Cir.), *cert. denied,* 423 U.S. 833 (1975).

limited to remedies against others specifically provided by Congress, *Bivens, supra,* 403 U.S. at 397.

Some courts have held that municipal immunity from suit under section 1983 necessarily indicates that Congress intended to immunize local government units from monetary liability under 28 U.S.C. §1331 and the fourteenth amendment. *See, e.g., Raffety* v. *Prince George's County,* 423 F. Supp. 1045 (D. Md. 1976); *Farnsworth* v. *Orem City,* 421 F. Supp. 830 (D. Utah 1976); *Pitrone* v. *Mercadante,* 420 F. Supp. 1384 (E.D. Pa. 1976); *Turano* v. *Board of Educ. of Island Trees Union Free School Dist. No. 26,* 411 F. Supp. 205 (E.D. N.Y. 1976); *Mitchell* v. *Libby,* 409 F. Supp. 1098 (D. Vt. 1976); *Snead* v. *Department of Social Services of City of N.Y.,* 409 F. Supp. 995, 1001-02 (S.D. N.Y. 1975) (three-judge court) (Mulligan, J., concurring); *Weathers* v. *West Yuma County School Dist. R-J-1,* 387 F. Supp. 552 (D. Colo. 1974), *aff'd,* 530 F.2d 1335 (10th Cir. 1976); *Smetanka* v. *Bourough of Ambridge,* 378 F. Supp. 1366 (W.D. Pa. 1974); *Perzanowski* v. *Salvio,* 369 F. Supp. 223 (D. Conn. 1974). The Supreme Court has not expressly resolved the issue. *See, e.g., Mt. Healthy City School Dist. Bd. of Education* v. *Doyle,* 97 S. Ct. 568, 571 (1977); *Aldinger* v. *Howard,* 427 U.S. 1, 4 n.3 (1976). However, the Supreme Court may well have already rejected local governmental immunity under section 1983 as a basis for disallowing an implied right of action against local governments under the fourteenth amendment. In *City of Kenosha* v. *Bruno, supra,* the Supreme Court held that section 1983 does not permit equitable relief against a city, but remanded the case to the district court to determine whether the prerequisites for general federal question jurisdiction under 28 U.S.C. §1331 were met and for reconsideration of the merits in light of several intervening decisions. *See* 412 U.S. at 514, 515. Against the City of

Kenosha, the issues on the merits could only be considered if there were an implied right of action against the city, because relief was unavailable under section 1983. The Supreme Court apparently did not view section 1983 as limiting the power of federal courts to imply remedies from the Constitution against a municipal corporation such as the City of Kenosha. *See City of Kenosha* v. *Bruno, supra,* 412 U.S. at 516 (Brennan, J., concurring); *Hostrop* v. *Board of Junior College District No. 515,* 523 F.2d 569, 577 (7th Cir. 1975), *cert. denied,* 425 U.S. 963 (1976); *Dahl* v. *City of Palo Alto,* 372 F. Supp. 647, 650 (N.D. Cal. 1974); Note, *Damage Remedies Against Municipalities For Constitutional Violations,* 89 Harv. L. Rev. 922, 941-42 (1976) (hereafter cited as Note, *Damage Remedies*). *But see Pitrone* v. *Mercadante,* 420 F. Supp. 1384, 1388 (E.D. Pa. 1976).

The majority of those courts considering these issues have concluded that monetary relief such as backpay may be awarded against local governmental entities on a *Bivens* theory, even though those governmental units are immune from section 1983 liability, and that such a remedy is an appropriate one to vindicate constitutional rights in proper cases.[8] Thus, we agree with the district court, 421 F. Supp. at 1119, that Owen may assert a claim for monetary relief under the fourteenth amendment against the City of Independence.[9] *See Stapp* v. *Avoyelles Parish School Bd.,*

8. As explained in the section of this opinion dealing with the remedy to be awarded Owen, *infra,* monetary relief in the nature of backpay is an "ordinary" or "necessary" remedy for the unlawful discharge of a public employee.

9. We emphasize that, given the facts of this case, we discuss only an equitable remedy, which may include backpay, for an illegally discharged public employee. We do not intend to imply that municipalities are monetarily liable for each and every constitutional violation committed by their agents. For example, cases such as *Adekalu* v. *New York City,* 431 F. Supp. 812 (S.D.

(*Continued on following page*)

545 F.2d 527, 531 n.7 (5th Cir. 1977); *Amen* v. *City of Dearborn,* 532 F.2d 554, 559 (6th Cir. 1976); *Reeves* v. *City of Jackson, Ms.,* 532 F.2d 491, 495 (5th Cir. 1976); *Cox* v. *Stanton,* 529 F.2d 47 (4th Cir. 1975); *Brault* v. *Town of Milton,* 527 F.2d 730 (2d Cir.), *rev'd on other grounds, id. at* 736 (2d Cir. 1975) (*en banc*); *Hostrop* v. *Board of Junior College District No. 515, supra,* 523 F.2d 569; *Gray* v. *Union County Intermediate Education District,* 520 F.2d 803, 805 (9th Cir. 1975); *Calvin* v. *Conlisk,* 520 F.2d 1 (7th Cir. 1975), *vacated and remanded on other grounds,* 424 U.S. 902, *cert. denied sub nom. Afro-American Patrolmen's League* v. *Conlisk,* 424 U.S. 912 (1976); *Hanna* v. *Drobnick,* 514 F.2d 393 (6th Cir. 1975); *Skehan* v. *Board of Trustees of Bloomsburg State College,* 501 F.2d 31, 41-44 (3d Cir. 1974), *vacated and remanded on other grounds,* 421 U.S. 983 (1975); *Adekalu* v. *New York City,* 431 F. Supp. 812 (S.D. N.Y. 1977); *Sedule* v. *Capital School Dist.,* 425 F. Supp. 552 (D. Del. 1976); *Sanabria* v. *Village of Monticello,* 424 F. Supp. 402 (S.D. N.Y. 1976); *Sixth Camden Corp.* v. *Township of Evesham,* 420 F. Supp. 709 (D. N.J. 1976); *Behan* v. *City of Dover,* 419 F. Supp. 502 (D. Del. 1976); *Sheets* v. *Stanley Community School Dist. No. 2,* 413 F. Supp. 350, 351 (D. N.D. 1975), *aff'd,* 532 F.2d 111 (8th Cir. 1976); *Demkowicz* v. *Endry,* 411 F. Supp. 1184 (S.D. Ohio 1975); *Collum* v. *Yurkovich,* 409 F. Supp. 557 (N.D. Ill. 1975); *Panzarella* v. *Boyle,* 406 F. Supp. 787 (D. R.I. 1975); *Williams* v. *Brown,* 398 F. Supp. 155 (N.D. Ill. 1975); *Everett* v. *City of Chester,*

Footnote continued—

N.Y. 1977); *Crosley* v. *Davis,* 426 F. Supp. 389 (E.D. Pa. 1977), and *Gresham* v. *City of Chicago,* 405 F. Supp. 410 (N.D. Ill. 1975), which refused to hold cities liable on a *Bivens* theory for brutality, false arrest and imprisonment, and unlawful search and seizure committed by individual police officers, absent proof that the cities' policy-making agencies or officials knowingly encouraged or tolerated such conduct, involve considerations of vicarious liability not present in this case where the conduct of the city's highest ranking officials allegedly resulted in the constitutional violation.

391 F. Supp. 26 (E.D. Pa. 1975); *Dahl* v. *City of Palo Alto*, 372 F. Supp. 647 (N.D. Cal. 1974).

The City also suggests in its brief that the Missouri rule of sovereign immunity for municipalities shields it from liability. The short answer to this contention is that this case presents a federal question in which state law does not control. As indicated in our discussion of remedies, *infra*, backpay is an appropriate remedy to vindicate the federal rights of illegally discharged public employees such as Owen, and contrary state immunity defenses cannot, consistent with the Supremacy Clause, protect the City. *Hampton* v. *City of Chicago*, 484 F.2d 602, 607 (7th Cir. 1973), *cert. denied*, 415 U.S. 917 (1974); *Sullivan* v. *Murphy*, 478 F.2d 938, 972 (D.C. Cir), *cert denied*, 414 U.S. 880 (1973); *Maybanks* v. *Ingraham*, 378 F. Supp. 913, 916 n.2 (E.D. Pa. 1974); Note, *Damage Remedies, supra*, 89 Harv. L. Rev. at 955-56.

II.

The Liberty Interest.

Despite the obviously derogatory and stigmatizing nature of Robert's statement on April 17, 1972 (one day preceding the actual discharge), the district court held that Owen had not been deprived of a constitutionally protected interest in liberty,[10] relying on three arguments. First, the

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10. The text of Roberts' statement, which is reproduced in full at 421 F. Supp. 1116 n.2, in part recites:

> On Saturday, April 15th for the first time I was able to see these 27 voluminous reports. The contents of these reports are astoundingly shocking and virtually unbelievable. They deal with the disappearance of 2 or more television sets from the police department and signed statement that they were taken by the Chief of Police for his own personal use.
>
> "The reports show that numerous firearms properly in the police department custody found their way into the

(*Continued on following page*)

district court reasoned that the only official reason for Owen's discharge by the city manager, the official with sole power to discharge the chief of police, was that Owen was "[t]erminated under the provisions of Section 3.3(1) of the City Charter [,]" which provided for discharge merely for the "good of the service." Thus, according to the district court, there exist no statements in Owen's official record which could possibly stigmatize Owen. 421 F. Supp. at 1121.

Secondly, the district court determined that there was no "causal connection" between Owen's discharge and the statement made by councilman Roberts and the actions taken by the city council. The court pointed out that before the council meeting of April 17, 1972, city manager Alberg had already decided to discharge Owen. Moreover, the city council and its members were prohibited by the city charter to attempt to influence the city manager's decision regarding hiring and firing of employees. *See* 421 F. Supp. at 1121.

Thirdly, the district court reasoned, 421 F. Supp. at 1121-22, that Owen was completely exonerated from any charges of criminal or immoral conduct by the city counselor's and city manager's pre-April 17th statements that the investigation had uncovered no evidence of illegal con-

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Footnote continued—

> hands of others including undesirables and were later found by other law enforcement agencies.
>
> "Reports whow (sic) that narcotics held by the Independence, Missouri Chief of Police have mysteriously disappeared. Reports also indicate money has mysteriously disappeared. Reports show that traffic tickets have been manipulated. The reports show inappropriate requests affecting the police court have come from high ranking police officials. Reports indicate that things have occurred causing the unusual release of felons. The reports show gross inefficiencies on the part of a few of the high ranking officers of the police department. [*Owen* v. *City of Independence, Mo.*, 421 F. Supp. 1110, 1116 n.2 (1976).]

duct in the police department, and by the county grand jury's subsequent return of a "no true bill."

We disagree. In determining whether a government employer has deprived its employee of a liberty interest in the termination of employment, the crucial issue is whether the government employer, in connection with the termination of government employment, including a refusal to rehire or reemploy, makes a charge which might seriously damage the employee's standing and reputation in the community. *Bishop* v. *Wood,* 426 U.S. 341 (1976); *Board of Regents* v. *Roth,* 408 U.S. 564, 573 (1972). *Compare Codd* v. *Velger,* ..... U.S. ....., 97 S.Ct. 882 (1977); *Paul* v. *Davis,* 424 U.S. 693, 708-710 (1976); *Wisconsin* v. *Constantineau,* 400 U.S. 433, 437 (1971).

The elements of a claim for deprivation of liberty on the part of a public employee, first enunciated by the Court in *Roth,* have been clarified in *Bishop* and *Codd,* as well as in the related case of *Paul* v. *Davis, supra.* In *Bishop, supra,* the city manager on recommendation of the police chief discharged a policeman for reasons of conduct "unsuited to an officer." 426 U.S. at 343. In addressing the liberty claim, Mr. Justice Stevens, writing for the majority, made reference to the elements necessary to establish the claim, *i.e.,* that the reasons given for the discharge may severely damage the employee's reputation in the community and that the employee claims those reasons were false. *Id.* at 347. In that case, petitioner could not establish his right to recovery because the city did not publicly disclose the asserted reasons for the discharge decision.

In *Codd* v. *Velger, supra,* Velger complained that he had been wrongly dismissed as a New York policeman without a hearing or statement of reasons. A potential employer in examining Velger's personnel file " 'gleaned

that plaintiff [Velger] had been dismissed because while still a trainee he had put a revolver to his head in an apparent suicide attempt.' " 97 S.Ct. at 883, *quoting* the findings of the district court. The Court held that policeman Velger did not state a claim because the record disclosed that he had failed to allege the falsity of the stated reasons for the dismissal. Thus, a hearing could clear his name.

The *Velger* Court explained as follows:

> Assuming all of the other elements necessary to make out a claim of stigmatization under *Roth* and *Bishop,* the remedy mandated by the Due Process Clause of the Fourteenth Amendment is "an opportunity to refute the charge." 408 U.S., at 573, 92 S.Ct. at 2707. "The purpose of such notice and hearing is to provide the person an opportunity to clear his name," *id.,* n. 12. But if the hearing mandated by the Due Process Clause is to serve any useful purpose, there must be some factual dispute between an employer and a discharged employee which has some significant bearing on the employee's reputation.
>
> * * *
>
> But the hearing required where a nontenured employee has been stigmatized in the course of a decision to terminate his employment is solely "to provide the person an opportunity to clear his name." If he does not challenge the substantial truth of the material in question, no hearing would afford a promise of achieving that result for him. For the contemplated hearing does not embrace any determination analogous to the "second step" of the parole revocation proceeding, which would in effect be a determination of whether or not, conceding that the report were true,

the employee was properly refused re-employment. Since the District Court found that respondent had no Fourteenth Amendment property interest in continued employment, the adequacy or even the existence of reasons for failing to rehire him presents no federal constitutional question. Only if the employer creates and disseminates a false and defamatory impression about the employee in connection with his termination is such a hearing required. *Roth, supra*; *Bishop, supra*. [*Id.* at 883-84 (footnote omitted).]

In *Paul* v. *Davis, supra,* Davis complained that a defamatory flyer issued by the chief of police of Louisville, naming Davis as an active shoplifter, deprived the complainant of "liberty" or "property" secured against state deprivation by the Due Process Clause. The Court, although rejecting the claim that an interest in one's reputation alone is protected by the Due Process Clause, reaffirmed its decision in *Board of Regents* v. *Roth,* 408 U.S. 564 (1972), with the following language:

> Thus it was not thought sufficient to establish a claim under § 1983 and the Fourteenth Amendment that there simply be defamation by a state official; *the defamation had to occur in the course of the termination of employment.* Certainly there is no suggestion in *Roth* to indicate that a hearing would be required each time the *State in its capacity as employer* might be considered responsible for a statement defaming an employee who continues to be an employee. [424 U.S. At 710 (emphasis added).]

The district court in finding no stigma focused upon the nondefamatory legal justification for Owen's discharge given by the city manager in the discharge notice. That notice by itself did not cast a stigma upon Owen. But

Roberts, in his capacity as a city councilman, released to the public and to the press a statement impugning Owen's honesty and integrity. This statement, allegedly false, was made at an official meeting of the city council. The city council itself appeared to lend support to Roberts' charges by resolving that the investigative reports be referred to the county prosecutor for presentation to the grand jury. Newspapers prominently reported Roberts' statement and the city council resolution. Owen's discharge followed immediately after the April 17, 1972 meeting. The city manager notified Owen of his discharge, citing no reasons for the discharge, but referring only to provisions of section 3.3(1) of the city charter. The fact of the discharge, Roberts' statement, and the council action received great publicity, and the newspapers linked the discharge to the investigation.[11]

The fact of actual stigma to Owen *connected with his discharge* is undeniable, for the action of the City of Independence as employer served to blacken Owen's name and reputation. That the stigmatizing charges did

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11. A lead article in the Independence, Missouri, *Examiner* for April 18, 1972, reported:

> The dismissal of the 35-year veteran police officer came on the heels of a massive police department audit of the property room and investigation into other areas of the department.
>
> The reports of that investigation were delivered to J. D. Williamson, an assistant Jackson County prosecutor, late Tuesday by one of the report investigators, Sgt. Robert Jackson.
>
> Lyle Alberg, city manager, made no comment on the firing but did name Lt. Lawrence Cook, a ten-year veteran of the department, as the new chief. Cook began his new duties today.

While city manager Alberg did not subscribe to councilman Roberts' derogatory remarks about Owen, his later public announcement that he was referring the investigative reports to the county attorney for submission to the grand jury did reinforce the city council's implication of wrongdoing against Owen.

not come from the city manager and were not included in the discharge notice is immaterial, because the official actions of the city council released charges against Owen contemporaneous and, in the eyes of the public, connected with that discharge. It is the fact of the City's public accusation which is of prime importance, not which official made the accusation. *See Cox* v. *Northern Virginia Transportation Commission*, 551 F.2d 555, 558 (4th Cir. 1976); *Churchwell* v. *United States*, 545 F.2d 59 (8th Cir. 1976); *Greenhill* v. *Bailey*, 519 F.2d 5 (8th Cir. 1975); *Birnbaum* v. *Trussell*, 371 F.2d 672 (2d Cir. 1966).

Finally, the secret deliberations of a grand jury cannot be deemed exoneration for one stigmatized in his employment or the equivalent to the due process right of an employee subject to dismissal to attempt to "clear his name" in hearings which can be open to the public. *See Codd* v. *Velger*, 97 S.Ct. at 883-84.

Accordingly, we hold that the action of the City of Independence deprived Owen of liberty without due process of law, in violation of Owen's rights under the fourteenth amendment.

III.

Property Interest.

The city charter of Independence provides in section 3.3(1) that a department head, such as the chief of police, may be removed by the city manager only "when deemed necessary for the good of the service." Owen contends here, as he did in the district court, that this city charter provision granted him a continuing contract as police chief, subject only to termination for cause. Therefore, he claims the protections of procedural due process in termination. The city charter makes no express provision for a termination hearing for department heads, but it also does not expressly deny that right.

Appellant relies principally on *Arnett* v. *Kennedy*, 416 U.S. 134 (1974). In that case, a federal employee, Kennedy, attacked the discharge procedures under the Lloyd-LaFollette Act, 5 U.S.C. § 7501, and attendant regulations, which did not extend to nonprobationary federal employees such as Kennedy the right to a full trial-type hearing before removal. Although the Supreme Court in a divided series of opinions rejected Kennedy's claim, six of the nine justices agreed that Kennedy's government employment was one which could be terminated only for cause, i.e., "such cause as will promote the efficiency of the service," 5 U.S.C. § 7501(a), and that such statutory language created a property interest in employment, entitling the employee to some form of a due process hearing prior to discharge.

Subsequently, in *Bishop* v. *Wood*, 426 U.S. 341 (1976), the Court considered the case of a Marion, North Carolina, police officer, who was classified as a permanent employee and covered by provisions of an ordinance which specified that an employee might be discharged if he failed "to perform work up to the standard of the classification held, or continues to be negligent, inefficient, or unfit to perform his duties * * *." *Id.* at 344 n.5. The Court rejected Bishop's claims to a property interest in his job because North Carolina precedent supported the lower court's conclusion that despite the language of the ordinance quoted above, that ordinance granted no right to continued employment, but merely conditioned an employee's removal upon compliance with certain specified procedures. *Id.* at 345. Thus, *Bishop* teaches that the Supreme Court's interpretation of a federal statute does not control the interpretation of similarly worded state laws.

While some of the Missouri cases which interpret statutes allowing discharge of public employees "for the good of the service." appear to support Owen's position, *see State ex rel. Reid* v. *Walbridge,* 119 Mo. 383, 24 S.W. 457 (1893); *State ex rel. Denison* v. *City of St. Louis,* 90 Mo. 19, 1 S.W. 757 (1886); *State ex rel. Eckles* v. *Kansas City,* 257 S.W. 197, 200-01 (Mo.App. 1923); *see also Friedman* v. *Miller,* 525 S.W.2d 770, 772 (Mo.App. 1975), the state supreme court's opinion in *State* v. *Crandall,* 269 Mo. 44, 190 S.W. 889 (1916) (*en banc*) supports the position of the appellee that Owen possessed no property interest in his job. The state court there said:

> [W]here the power to remove is given, expressly or by necessary implication, in the Enabling Act, by words or terms denoting that it may be exercised in discretion, such power, to the extent thus given, is ex hypothesi, one which may be exercised whenever in the mind and judgment of the donee of the power the fact or thing exists upon which his discretion is rested. In the case at bar the statute in express terms tells the Governor to remove any commissioner "upon his being fully satisfied" of "the alleged official misconduct" of such commissioner. It therefore falls within the exact terms of the proposition last stated* * *. [190 S.W. at 891.]

The provision of the charter which authorizes the city manager to "[a]ppoint, and *when deemed* necessary for the good of the service * * * remove all directors or heads of administrative departments" may be fairly interpreted as conferring upon the city manager the power to remove such officers at will. [Emphasis added]. The city manager's power to discharge seems analogous to that of the governor in *Crandall,* who could discharge "upon his being fully satisfied" that there was misconduct. Under

Missouri law, such language confers the power to discharge at will.

The district court determined that under the home rule provisions of the Missouri Constitution, the applicable law is the charter of the City of Independence. The court construed that charter not to provide rights to a notice and hearing for an employee who is an administrative department head such as Owen, and responded to appellant's argument that he was entitled to a hearing with this language:

> Plaintiff argues that in spite of the fact that heads of administrative departments are not *expressly* accorded rights to notice and a hearing, such rights are to be *implied* from the fact that heads of administrative departments were made dischargeable only "when necessary for the good of the service." However, from Sections 3.28 and 3.1 of the Charter, it is clear that the drafters of the Charter knew how to expressly provide for rights to notice and a hearing when such rights were intended. In view of the express provision of such rights to other employees, it is unlikely that the drafters intended to accord heads of administrative departments such rights by implication through use of the phrase "for the good of the service." Rather the absence of an express provision of such rights is persuasive evidence that no such rights were intended to exist. [421 F. Supp. at 1125.]

We can find no specific Missouri case law to the contrary. While the question is one not entirely free from doubt, under these circumstances we are required to give great weight to the views of the district judge, who is familiar with the local law. *See Merchants Mutual Bonding Co.* v. *Appalachian Ins. Co.,* No. 76-1334 (8th Cir., June 16, 1977); *Rodeway Inns of America, Inc.* v. *Frank,* 541 F.2d 759,

767 (8th Cir. 1976), *cert. denied*, ... U.S. ....., 97 S.Ct. 1580 (1977); *Luke* v. *American Family Mut. Ins. Co.*, 476 F.2d 1015 (8th Cir.) (*en banc*), *cert. denied*, 414 U.S. 856 (1973).

Accordingly, we reject Owen's contention that he possessed a property interest in continued employment as chief of police of the City of Independence.

IV.

Remedy.

We held in *Wellner* v. *Minnesota State Jr. College*, 487 F.2d 153 (8th Cir. 1973), that when an untenured employee of a state agency is, upon discharge, stigmatized by the release of defamatory information by his employer and denied the right to clear his name in a public hearing, that employee is entitled to judgment including lost wages, but not actual reinstatement.[12] In that case we said:

> Wellner [the state employee] was improperly discharged because he was not accorded an appropriate hearing. His termination was therefore a nullity and he remains on the payroll until a proper hearing is held, at which time he may be retained or not reappointed. It is not within our province to speculate that after a proper hearing clearing his reputation the Board will recommend that Wellner not be reappointed, or that the appropriate official will not reappoint him to a similar teaching position. In any event, Wellner remains on the payroll and is entitled to receive the wages he will have earned until his name is cleared by proper Board action and the decision is properly made with respect to whether he will be reappointed. [487 F.2d at 157.]

12. The court majority in *Bishop* v. *Wood*, *supra*, 426 U.S. 341, commented that

> [t]he federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United State Constitution cannot feasibly be construed to require federal judicial review for every such error. [*Id.* at 349-50 (footnote omitted).]

Footnote 14 at p. 349 adds, in part:

> The fact of the matter, however, is that the instances in which the federal judiciary has required a state agency to reinstate a discharged employee for failure to provide a pretermination hearing are extremely rare.

As we have noted, Owen's age bars him from qualifying to serve further as chief of police, so vindication of his good name could not restore Owen to this job at this time. Moreover, in light of the findings by the district court that the city manager, prior to April 17, 1972, had decided to discharge plaintiff for reasons which apparently did not relate to Owen's honesty or integrity, a full back-pay remedy would afford Owen a windfall at the expense of the municipality and the municipal taxpayers. A person deprived of constitutional rights by the Government is entitled to relief only to the extent of the harm sustained, *Codd* v. *Velger*, *supra*, 97 S.Ct. at 884; to the extent that the constitutional violation causes no injury, no remedy is called for, *Mt. Healthy City School District* v. *Doyle*, *supra*, 97 S.Ct. at 575. Thus, in its remedial aspects, this case can be distinguished from *Wellner*, for there one could not say whether or not the discharged employee would have retained his job after a public hearing.

However, merely to order that the City now give Owen a hearing would amount to no relief at all. Although Owen would not have remained chief of police even after a hearing, it seems likely that he was still employable in the law enforcement field and that Roberts' charges adversely affected Owen's employability. The rec-

ord discloses that the city manager did offer Owen a different position with the City when Owen's resignation was demanded. In addition, he did work at some other security jobs during the period between his discharge and the time when he would have retired. However, the record shows that Owen sought other similar employment opportunities and that at least one such opportunity was denied him because of the adverse publicity surrounding his discharge. We believe some amount of compensatory relief is appropriate here. The present record[13] can furnish an adequate basis for the district court to determine the proper amount of compensation, measured by the amount of money he likely would have earned to retirement if he had not been deprived of his good name by the action of the City, subject to mitigation, including the amounts earned up to retirement age as well as the amount, if any, recovered from councilman Roberts in the state defamation suit.

The award against the municipality here, while not strictly backpay is in lieu of backpay and represents a form of equitable relief, because, as explained in the *Wellner* case, Owen's termination without an appropriate hearing must be deemed a nullity; he remains on the payroll and is entitled to backpay. As we have noted, however, he is not entitled to a windfall.

V.

Good Faith Defense.

The good faith of the municipality does not constitute a defense to exaction of monetary relief as an element

13. At the district court's discretion, it may permit the parties to supplement the record by such additional evidence as may be available bearing upon Owen's likely earnings to retirement in the absence of his being deprived of his good name.

of equitable relief. Backpay has been often considered an incident to equitable relief. *See NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937); *Harkless* v. *Sweeny Independent School Dist.*, 427 F.2d 319, 324 (5th Cir. 1970), *cert. denied*, 400 U.S. 991 (1971).

In making available to the City the defense of good faith, the district court relied on the elements of that defense applied in section 1983 actions against state officials, as enunciated in *Wood* v. *Strickland*, 420 U.S. 308, 319-21 (1975), and *Scheuer* v. *Rhodes*, 416 U.S. 232, 241-42 (1974). *Wood* v. *Strickland* notes that "immunity from damages does not ordinarily bar equitable relief as well." 420 U.S. at 314-15 n. 6. To the extent that backpay or a lesser equivalent qualifies as equitable relief, the immunity ruling of the *Wood* case ought not to apply.

Moreover, the primary justification for the defense of good faith in *Wood*, to insure that public officials will not hesitate to discharge their duties out of fear of personal monetary liability, *see* 420 U.S. 319-21, does not exist where the city itself will bear the monetary award. In *Hander* v. *San Jacinto Junior College*, 519 F.2d 273, *rehearing denied*, 522 F.2d 204 (5th Cir. 1975), which involved an illegally discharged college professor, the court refused to apply the immunity rule of *Wood* v. *Strickland*, stating:

> The *Wood* rationale, however, is inapplicable to the instant case because the backpay award is entered against San Jacinto Junior College itself and not against the individual members of the Board of Regents. [519 F.2d at 277 n. 1.]

See also Developments in the Law: Section 1983 and Federalism, supra, 90 Harv. L.Rev. at 1217-20; Note, *Damages Remedies*, 89 Harv. L.Rev. at 955-58.

In addition to the *Wellner* case previously cited, this court in *Cooley* v. *Board of Educ. of Forrest City School Dist.*, 453 F.2d 282, 287 (8th Cir. 1972), awarded backpay against a school board in favor of an unconstitutionally discharged schoolteacher. Although *Wellner* and *Cooley* arose under section 1983, the backpay liability was assessed against the school officials in their official capacities and constituted an obligation of the school districts themselves, not the individual defendants. If equitable relief will be against a school board without regard to the board's good faith as it did in *Wellner* and *Cooley*, we perceive no reason to extend a qualified good faith immunity to a city which has inflicted similar injury to an employee's reputation in the course of discharging that employee.

Whether good faith may be a defense to a municipality in an action for damages apart and aside from backpay or its equivalent, *see, e.g., Hostrop* v. *Board of Junior College Dist. No. 515*, 523 F.2d 569, 579 (7th Cir. 1975), *cert. denied*, 425 U.S. 963 (1976) (damages for violation of intangible constitutional rights) is a matter which we do not address in this opinion.

Finally, in determining that the city officials acted in good faith, the district court focused upon the City's failure to give Owen a hearing. The city manager and the members of the city council, except councilman Roberts, all testified and asserted that they did not know in April 1972, that an employee in Owen's position was entitled to a hearing, and testified further that their actions arose from a good faith belief that the public was entitled to know the results of the investigation. The fact of the matter is that the results of the investigation were never made public. Councilman Roberts, however, made statements at an official meeting of the city council implying that the investigation showed the chief of police to have

been guilty of criminal conduct, without giving the accused person an opportunity to respond or to defend himself. It is Roberts' allegedly false accusation which damaged Owen's reputation and future employment prospects. The city officials may have acted in good faith in refusing the hearing, but lack of good faith is evidenced by the nature of the unfair attack made upon the appellant by Roberts in the official conduct of the City's business. The district court did not address the good faith defense in light of Roberts' defamatory remarks.

In any event, however, we hold the good faith defense unavailable as a matter of law in cases involving claims for backpay and similar equitable remedies which will be borne by a unit of government and not individual office holders.

VI.

Conclusion.

It follows from the foregoing discussion that, in addition to some compensatory relief, Owen is entitled to a declaratory judgment that his discharge from employment deprived him of constitutionally protected liberty without due process of law.

Accordingly, we reverse the judgment and remand this case to the district court for entry of the declaratory judgment and an award of compensatory relief consistent with this opinion.

VAN OOSTERHOUT, Senior Circuit Judge, dissenting.

The issue of whether an action against a city and its officers can be instituted directly under the fourteenth amendment and 28 U.S.C. §1331 is a close one on which, as noted by majority, the courts are divided. The issue

is one which "has never been decided by [the Supreme Court]." *Mt. Healthy Bd. of Educ.* v. *Doyle,* ..... U.S. ....., 45 U.S.L.W. 4079, 4080 (Jan. 11, 1977). Since in my opinion plaintiff cannot recover on the merits, I will assume for the purpose of this case, without so concluding, that the majority has correctly resolved this issue. I accordingly do not dissent from the dismissal of the cross-appeal.

I agree with the majority that the plaintiff was an untenured employee and that he had no property interest in his position.

My point of departure is on the majority's holding that plaintiff was deprived of a liberty interest without a hearing and in particular on the majority's conclusion that the stigma to Owen was "connected with his discharge". That this conclusion is essential to the result reached by the majority is clear. In *Paul* v. *Davis,* 424 U.S. 693 (1976), city police had furnished a list of shoplifters to local merchants for the purpose of assisting them in preventing shoplifting. Plaintiff, whose name appeared on the list, had been charged with shoplifting but had not been tried when the list was provided. On the liberty issue the Court holds:

> The words "liberty" and "property" as used in the Fourteenth Amendment do not in terms single out reputation as a candidate for special protection over and above other interests that may be protected by state law. While we have in a number of prior cases pointed out the frequently drastic effect of the "stigma" which may result from defamation by the government in a variety of contexts, this line of cases does not establish the proposition that reputation alone, apart from some more tangible interests such as employment, is either "liberty" or "property" by itself

> sufficient to invoke the procedural protection of the Due Process Clause.
>
> * * *
>
> While not in uniform in their treatment of the subject, we think that the weight of our decisions establishes no constitutional doctrine converting every defamation by a public official into a deprivation of liberty within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.
>
> * * *
>
> Thus it was not thought sufficient to establish a claim under §1983 and the Fourteenth Amendment that there simply be defamation by a state official; the defamation had to occur in the course of the termination of employment.

Id. at 701, 702, 710.

As set out in the trial court's findings of fact incorporated in the majority opinion, the city manager had exclusive jurisdiction to hire and fire city employees. The chief of police was subject to this provision. The city charter specifically prohibits the mayor or council from interfering with the appointment or discharge of any officer, such as the chief of police. Violation constitutes a misdemeanor and grounds for removal from office upon conviction.

On April 10, 1972, the city manager, being dissatisfied with the work of the chief of police, requested the chief to resign and accept another position in the police department, which plaintiff refused to do. On April 13, the city manager obtained the consent of one Cook to serve as police chief. On April 18, plaintiff was formally advised of his discharge.

The majority agrees with the district court's determination that no stigma attached to the nondefamatory discharge notice given by the city manager. The defamation made was contained in information released by councilman Roberts at an April 17 council meeting. Neither the mayor nor the council had any voice in plaintiff's discharge. Plaintiff had been fully advised on April 10 and 11 that he would be discharged if he did not resign and arrangements for a successor were made on April 13 by the city manager, all prior to the April 17 council meeting.

I readily acknowledge that "official actions of the city council released charges against Owen contemporaneous and, in the eyes of the public, connected with that discharge." Majority opinion, *supra* at 6. While this fact might have some bearing on the amount of damages recoverable in a state action for defamation, I cannot agree that it somehow creates an otherwise absent liberty interest entitling plaintiff to a hearing. It is clear that the public impression gleaned from media reports did not conform to the true situation, for the only official charged with responsibility to discharge, the city manager, made no stigmatizing allegation. Nor was he in any way responsible for the mistaken impression gained by the public. *Cf. Cox* v. *Northern Virginia Transportation Commission*, 551 F.2d 555, 558 (4th Cir. 1976). Since nothing in the discharge process itself cast a stigma upon plaintiff, *Paul* v. *Davis* is, in my opinion, controlling.

I agree with the trial court's determination that there is no causal connection between plaintiff's discharge by the city manager and the statements of Roberts at the council proceedings. Such determination is supported by substantial evidence and is not clearly erroneous under

the authorities heretofore cited. No violation of plaintiff's liberty rights in connection with his discharge has been established.

I find it unnecessary to reach the good faith issue. I would affirm the judgment of dismissal.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX C

George D. OWEN, Plaintiff

v.

CITY OF INDEPENDENCE, MISSOURI, et al., Defendants.

Civ. A. No. 73CV138-W-3.

United States District Court,
W. D. Missouri, W. D.

June 25, 1976.

WILLIAM H. BECKER, Chief Judge.

This is an action under the Civil Rights Act of 1871, Section 1983, Title 42, United States Code, and under the Fourteenth Amendment to the Constitution of the United States. Plaintiff, George D. Owen (hereinafter "plaintiff"), contends that his prior employment as Chief of Police of Independence, Missouri, was terminated without notice of the reasons for the discharge or a hearing in violation of his rights to procedural and substantive due process under the Fourteenth Amendment, and that he was discharged in retaliation for his exercise of First Amendment rights. He seeks declaratory and injunctive relief to compel the defendants to grant him notice and a hearing, and equitable relief in the form of back pay and other fringe benefits from the date of his discharge to the date the defendants grant him the notice and hearing he requests.[1]

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1. In the original and amended complaints, plaintiff made other claims and prayers for relief, including reinstatement. The prayer for reinstatement has been abandoned because plaintiff is now disqualified by reason of his age to be Chief of Police. The claims and prayers for relief other than those considered herein were denied in the "Order Denying Plaintiff's Motion For Summary Judgment and Narrowing Issues For Evidentiary Hearing," filed February 6, 1975.

Defendants are the present City Manager, Mayor, and members of the City Council of the City of Independence (hereinafter "City"); and the City itself. Defendants deny plaintiff's factual and legal contentions, and further assert that even if plaintiff's contentions are determined in his favor, defendants are not liable for damages because they, or their predecessors, acted at all times in "good faith." Defendant City also contends that subject matter jurisdiction does not exist with respect to plaintiff's claims against it.

After completion of the pretrial proceedings, a plenary evidentiary trial without a jury was held on May 17, 1976. The hearing was continued without objection from the parties to June 22, 1976, and was completed on that date. The parties have filed proposed findings of fact and conclusions of law and have fully briefed the legal issues. In order to expedite a final judgment, the following material findings of fact and conclusions of law are made based upon full consideration of the factual and legal contentions of the parties and the evidence presented.

I. FINDINGS OF FACT

Plaintiff is, and at all times material was, a citizen of the United States and a resident of the State of Missouri.

Defendant City is a municipal corporation organized and existing under the laws of the State of Missouri. The City's government is organized in the council-manager form pursuant to a Missouri Constitutional Home Rule city charter adopted December 5, 1961, and amended April 4, 1972.

Defendant Lyle W. Alberg is the duly appointed and acting City Manager and Chief Administrative Officer of the City.

Defendant Richard A. King is the duly elected and acting Mayor of the City and a member of the City Council. He is the successor of Phil K. Weeks who was, on April 17, 1972, and prior thereto, the City's Mayor.

Defendants Charles E. Cornell, Dr. Ray Williamson, Dr. Duane Holder, Ray A. Heady, Mitzi A. Overman, and E. Lee Comer, Jr., are the duly elected and acting members of the City Council of the City. They are the successors of William A. McGraw, Lauzon H. Maxwell, Arthur W. Lamb, R. M. "Rudy" Bonville, Morris D. McQuinn and Paul L. Roberts who were the members of the City Council on April 17, 1972, and prior thereto.

Under Section 3.3(1) of the City's Charter, the City Manager is vested with the sole power to

> "[a]ppoint, and when deemed necessary for the good of the service, lay off, suspend, demote, or remove all directors, or heads of administrative departments and all other administrative officers and employees of the city. . . ."

Plaintiff, as Chief of Police, was subject to this provision. The Charter did not provide that the Chief of Police was entitled to any notice of reasons, or a hearing, in connection with the termination of his employment.

The City Council, and its members, are prohibited from influencing, or interfering with in any manner, the City Manager's power of appointment and discharge of City employees. Section 2.11 of the City Charter provides that:

> "[n]either the council, the mayor, nor any of its other members may direct the appointment of any person to, or his removal from office or employment by the city manager or by any other authority, or, except as provided in this charter, participate in any manner in the appointment or removal of officers and employees of the city. Except for the purpose of inquiry, the council, the mayor, and its other members shall deal with the administrative service solely through the city manager. . . . If the mayor or any other councilman violates any provision of this section, he shall be guilty of a misdemeanor, and upon conviction thereof, shall cease to be a councilman. . . ."

On February 20, 1967, plaintiff was appointed Chief of Police of the City for an indefinite term by then City Manager Robert L. Broucek. Prior to that time, he had served as an assistant to the Chief of Police of Kansas City, Missouri. Plaintiff was given no contract of employment, and there was no *de facto* tenure system which would have given him a reasonable or legitimate expectation of continued employment. Plaintiff served as Chief of Police until his employment was terminated effective April 19, 1972, by notice in writing of April 18, 1972, by the present City Manager Lyle W. Alberg.

For a substantial period of time prior to March, 1972, plaintiff and City Manager Alberg had had several sharp disagreements over plaintiff's administration of the Police Department, including but not limited to plaintiff's choice of people for positions in the Department and his administration of the Police Department's property room. In early March, 1972, a handgun, which had been destroyed according to records of the Department's property room, was discovered in the hands of a felon by Kansas City, Missouri, police. In about mid-March, 1972 City Manager Alberg initiated an investigation of the property room of the Police Department initially under plaintiff's direction. Later in March, 1972, Alberg decided that the investigation

should be conducted by an independent branch of the city government. He transferred the two police officers who had begun the investigation, Sergeant Robert Jackson and Detective William Reynolds, to the City's Department of Law; and directed City Counselor James S. Cottingham who was head of the Department of Law to supervise the conduct of the investigation and to report the findings of the investigation directly to him.

On or before April 12, 1972, City Manager Alberg received copies of statements of witnesses secured in the investigation, and reports from the City Auditor and City Counselor Cottingham. The City Auditor reported that there were insufficient records in the Police Department property room to make an adequate audit of the property in the property room. Cottingham reported in writing to Alberg that there was no evidence of any criminal acts, or violation of any state law or municipal ordinances, in the administration of the property room.

At an informal meeting with several of the City Council members, which took place on or before April 10, 1972, City Manager Alberg discussed the investigation and told the City Council members he would take action at an appropriate time to correct any problems in administration of the Police Department disclosed by the investigation. At that time, Alberg intended to keep the witness statements and details of the findings of the investigation confidential.

On April 10, 1972, Alberg communicated by telephone with plaintiff, who was then on vacation in Las Vegas, Nevada. Alberg told plaintiff he was dissatisfied with plaintiff's job performance, and asked plaintiff to resign as Chief of Police and accept another position in the Police Department. He told plaintiff if he refused to accept

another position in the Department, he would be discharged. Plaintiff requested a personal conference with Alberg in Independence the following day.

On April 11, 1972, Alberg and plaintiff met in Alberg's office in Independence. Alberg stated to plaintiff that he was dissatisfied with plaintiff's administration of the Police Department, including plaintiff's lack of supervison over the records section of the Department; the state of those records; and plaintiff's inadequate administration, and lack of control, of the property room which had resulted in the reappearance of supposedly destroyed property in the hands of other people. Alberg again requested plaintiff to resign as Chief of Police, and to accept an advisory position with the Police Department. Plaintiff responded that he was not interested in another position, and that he would fight to remain Chief of Police. Alberg told plaintiff that if he continued to refuse to take another position, his employment with the City would be terminated.

On April 13, 1972, Alberg had a discussion with Lieutenant Lawrence L. Cook of the Police Department, during which he asked Cook if he would be willing to take the position of Chief of Police. Cook stated that he would. On the same day, Alberg released a public communication to the Mayor and City Council concerning the investigation and audit of the Police Department's property room, which stated:

> "At my direction, the City Counselor's office, in conjunction with the City Auditor have completed a routine audit of the police property room.
>
> "Discrepancies were found in the administration, handling and security of recovered property. There ap-

pears to be no evidence to substantiate any allegations of a criminal nature.

"Steps have been initiated on an administrative level to correct these discrepancies."

Alberg's statement was prominently reported by a local newspaper.

Alberg was away from Independence on the weekend of April 15 and 16, 1972. On April 15, he decided to replace plaintiff with Lieutenant Cook as Chief of Police. However, he did not inform anyone of his decision, and did not take formal action to implement his decision until April 18, 1972.

In Alberg's absence, Assistant City Manager Parley Banks became the Acting City Manager. During the weekend, City Councilman Paul L. Roberts requested copies of the reports of the audit and statements of witnesses secured in the investigation of the Police Department property room. Roberts had recently been defeated for reelection to the City Council, and his term was to expire following the meeting of the City Council on the evening of April 17, 1972. Banks, unaware of Alberg's intention to keep the details of the reports confidential, complied with Roberts' request and delivered the documents to Roberts without reading them.

During the weekend Roberts read the reports and unilaterally decided that their contents should be made public. He secretly drafted a statement to be made by him without prior notice to anyone, at the City Council meeting on the evening of April 17, 1972. The statement is described below.

An informal meeting was held on the morning of April 17, 1972, between Alberg and four members of the

City Council, during which the investigation of the Police Department was again discussed. At that time, Alberg did not inform the council members of his intention to discharge plaintiff; and Councilman Roberts did not disclose his intention to make a statement concerning the investigation at the formal meeting of the City Council that evening.

On the evening of April 17, 1972, the City Council held a regularly scheduled meeting. The agenda of the meeting did not list a statement or motion by Councilman Roberts. After completion of the scheduled business, Councilman Roberts read his prepared statement. The statement alleged that plaintiff had taken two television sets from the property room of the Police Department for his own personal use; that numerous firearms in the custody of the Police Department had ". . . found their way into the hands of others including undesirables . . ."; that narcotics being held by the Department ". . . have mysteriously disappeared"; that traffic tickets had been manipulated; that inappropriate requests had been made by "high ranking police officials to the police court"; ". . . that things have occurred causing the unusual release of felons"; and the reports disclosed "gross inefficiencies on the part of a few of the high ranking officers of the police department." Councilman Roberts then moved that the reports be made public; that they be turned over to the Prosecuting Attorney of Jackson County; and that the City Council recommend to the City Manager

> ". . . that he should take all direct and appropriate action permitted under the Charter against such persons as are shown by the investigation to have been involved in illegal, wrongful, or gross inefficient activities brought out in the investigative reports, and to complete the investigation."

The full statement is set out in a marginal note.[2] After discussion of Councilman Roberts' motion, six members of the Council voted to approve the motion. Councilman McGraw abstained from voting on the motion.

On April 18, 1972, City Manager Alberg implemented his prior decision to discharge plaintiff as Chief of Police. On that day plaintiff received a written notice from Alberg stating merely that his employment as Chief of Police was "[t]erminated under the provisions of Section 3.3(1) of the City Charter" effective April 19, 1972. Plaintiff requested that Alberg provide him with written notice of

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2. The statement, in its entirety, read:

"On April 2, 1972, the City Council was notified of the existence of an investigative report concerning the activities of the Chief of Police of the City of Independence, certain police officers and activities of one or more other City officials. On Saturday, April 15th for the first time I was able to see these 27 voluminous reports. The contents of these reports are astoundingly shocking and virtually unbelievable. They deal with the disappearance of 2 or more television sets from the police department and signed statement that they were taken by the Chief of Police for his own personal use.

"The reports show that numerous firearms properly in the police department custody found their way into the hands of others including undesirables and were later found by other law enforcement agencies.

"Reports whow (sic) that narcotics held by the Independence, Missouri Chief of Police have mysteriously disappeared. Reports also indicate money has mysteriously disappeared. Reports show that traffic tickets have been manipulated. The reports show inappropriate requests affecting the police court have come from high ranking police officials. Reports indicate that things have occurred causing the unusual release of felons. The reports show gross inefficiencies on the part of a few of the high ranking officers of the police department.

"In view of the contents of these reports, I feel that the information in the reports backed up by signed statements taken by investigators is so bad that the council should immediately make available to the news media access to copies of all of these 27 voluminous investigative reports so the public can be told what has been going on in Independence.

(*Continued on following page*)

the reasons for the termination and a hearing in a letter to Alberg dated April 15, 1972. The letter was not received by Alberg until after plaintiff's discharge. Both the action of the City Council and plaintiff's discharge by City Manager Alberg were prominently reported in local newspapers.

After termination of plaintiff's employment, Alberg referred the investigation reports and statements to the Prosecuting Attorney of Jackson County, Missouri, for consideration by a grand jury as recommended by the City

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Footnote continued—

I further believe that copies of these reports should be turned over and referred to the prosecuting attorney of Jackson County, Missouri for consideration and presentation to the next Grand Jury. I further insist that the City Manager immediately take direct and appropriate action, permitted under the Charter, against such persons as are shown by the investigation to have been involved.

"I have been advised that the City Manager has requested the resignation of the Chief of Police but to date the Chief has not done so. It should be noted that many persons in the Police Department have come forward in the investigation of these matters and have cooperated in this investigation and their efforts are recognized and appreciated. Because these investigative reports and statements have not been available to the news media, I respectfully move as follows:

"I move first that the Council instruct the City Manager to immediately make available to the news media access to copies of all the 27 volumimous (sic) investigative reports and the statements and attachments therewith.

"Second:

"That copies of the investigative reports be turned over and referred to the Jackson County Prosecuting Attorney for presentation to the next Grand Jury.

"Third:

"The City Council recommends to the City Manager that he should take all direct and appropriate action permitted under the Charter against such persons as are shown by the investigation to have been involved in illegal, wrongful, or gross inefficient activities brought out in the investigative reports, and to complete the investigation."

Council. The grand jury subsequently returned a "no true bill." Since that time, neither City Manager Alberg nor the City Council made any further investigation of plaintiff's administration of the Police Department.

In April, 1972, plaintiff's attorney requested a hearing on the reasons for plaintiff's discharge. The request was denied by Assistant City Counselor James L. Gillham by a letter to plaintiff's counsel dated May 3, 1973.

Plaintiff contends that his discharge on the day following Councilman Roberts' disclosure of details of the investigation and the City Council's actions has imposed a "stigma" of illegal or unprofessional conduct upon his personal and professional reputation which has impaired his ability to obtain future employment. However, defendants have shown by a preponderance of the evidence that the circumstances of plaintiff's discharge did not result in imposition of such a "stigma" for two reasons.

First, there was no causal relationship between the termination of plaintiff's employment and Councilman Roberts' statement and the action of the City Council. City Manager Alberg had decided prior to the City Council meeting to terminate plaintiff's employment. Alberg had sole responsibility for hiring and discharging the Chief of Police. City Council members were prohibited by law from taking any action to influence Alberg's personnel decisions. Roberts' statement and motion were unauthorized actions under the City Charter. (Plaintiff sued Roberts and Alberg in state court in an action for damages based on the defamatory statement of Roberts and the alleged attempt to procure criminal charges against the plaintiff. During trial of this state court action plaintiff settled with Roberts giving a general release of all liability of Roberts to plaintiff and agreed to drop Alberg as a party.)

Second, plaintiff was completely exonerated in writing from any charges of criminal misconduct arising out of the investigation of the Police Department by City Counselor Cottingham, who was in charge of the investigation as head of the Department of Law, and by City Manager Alberg, who was the only City official with the power to terminate (or reinstate) plaintiff's employment. In his communication to the City Council on April 13, 1972, Alberg publicly stated, on the basis of the report of the City Counselor, that although there was evidence of inefficiency in administration of the Police Department, ". . . there was no evidence to substantiate any allegations of a criminal nature." At no time before or after plaintiff's discharge has City Manager Alberg or the City Counselor ever made any statements which imply that plaintiff's discharge resulted from criminal or other "stigmatizing" misconduct. Further, in addition to Alberg's statement, plaintiff was exonerated by the grand jury's return of a "no true bill" following its investigation of the charges made at the April 17, 1972, City Council meeting.

Plaintiff also alleged in the complaint that his discharge was in retaliation for exercise of First Amendment rights. However, there is no evidence in the record to support that allegation.

Although the foregoing factual determinations are sufficient to determine the issue of liability in favor of defendants, the material factual issues with respect to defendants' "good faith" defense will also be determined. Based on assumptions (without so finding) that "stigmatizing" charges made by Councilman Roberts were the basis for plaintiff's discharge, and that plaintiff was accordingly entitled to notice of the reasons for his discharge and a hearing under the Fourteenth Amendment, the material factual issues on defendants' "good faith" defense are (1)

whether defendants knew, or reasonably should have known, that their refusal to grant plaintiff the requested notice and hearing violated plaintiff's rights under the Fourteenth Amendment; and (2) whether defendants acted with the malicious intention to cause a deprivation of rights guaranteed by the Fourteenth Amendment, or other injury, to the plaintiff.

There is no evidence that the individual defendants knew in April, 1972, that a public employee who was discharged on the basis of serious allegations of illegal or immoral conduct was entitled by virtue of the Fourteenth Amendment to notice of the reasons for his discharge, and to an opportunity for a hearing to clear his reputation. Neither City Manager Alberg, nor any of the members of the City Council were attorneys. Alberg, Mayor Weeks, and Councilmen Maxwell, McGraw, Lamb and McQuinn all testified that they did not know in April, 1972 that such rights existed, and that they relied on the City's Department of Law for legal advice.[3] After receiving plaintiff's letter request for notice of reasons for his discharge and a hearing, Alberg directed an inquiry to the City's Department of Law to determine whether plaintiff was entitled to notice and a hearing. Alberg testified that at no time did City Counselor Cottingham advise him that plaintiff had a right to notice and a hearing under either the City Charter, state law, or the United States Constitution. Cottingham also advised Councilman McGraw and Councilman Roberts' successor, Dr. Eugene Theiss, that plaintiff had no right to a hearing; and Assistant City Counselor James L. Gillham gave the same answer to plaintiff's counsel in response to plaintiff's counsel's request for certification of plaintiff's discharge to the proper appellate board.

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3. Councilman Bonville is deceased.

Further, the individual defendants have proven by a preponderance of the evidence that their belief that plaintiff had no right to notice and a hearing was reasonable. The United States Supreme Court first recognized that a public employee, who was discharged under circumstances imposing a "stigma" on his professional reputation and injuring his ability to find employment in the future, was entitled to notice and a hearing to clear his name in *Board of Regents* v. *Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), and *Perry* v. *Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). These cases were decided on June 29, 1972, more than two months after plaintiff's discharge. The individual defendants cannot reasonably be charged with notice of the subsequent decision in these cases. Plaintiff presented no evidence that the individual defendants should have recognized the right to a hearing, under the circumstances, on the basis of any other controlling authority in existence in April, 1972.

Finally, there is no evidence that City Manager Alberg or the members of the City Council acted with malice in denying plaintiff's request for notice and a hearing. Alberg testified that his personal relationship with plaintiff was good despite his disagreement with plaintiff over plaintiff's administration of the Police Department. The City Council members all testified that they acted out of a good faith belief that the results of the investigation of the Police Department were matters which should be made public, and that they bore no ill will toward plaintiff personally. Their testimony is credible and is not substantially controverted by opposing evidence.

It is, therefore, factually concluded that plaintiff's employment as Chief of Police was not terminated under circumstances in which his reputation and prospects for future employment were damaged by allegations of im-

moral, illegal, or other "stigmatizing" conduct; that plaintiff's employment was not terminated in retaliation for his exercise of First Amendment rights; and that even if discharged under "stigmatizing" circumstances, the individual defendants acted in good faith in refusing to grant plaintiff's requests for notice of the reasons for his discharge and a hearing to clear his name because they neither knew, or reasonably should have known, of the existence of such rights under the Fourteenth Amendment, and did not act maliciously to deprive plaintiff of Fourteenth Amendment rights or to cause him injury.

II. CONCLUSIONS OF LAW

A. *Subject Matter Jurisdiction*

Subject matter jurisdiction over the claims against the individual defendants under Section 1983, Title 42, United States Code, exists under Section 1343(3) and (4), Title 28, United States Code.

[1] However, Section 1983, Title 42, United States Code, does not create a claim for relief against the defendant City, because a municipal corporation is not a "person" within the meaning of that term as employed in Section 1983. *City of Kenosha* v. *Bruno,* 412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973); *Moor* v. *County of Alameda,* 411 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973); *Monroe* v. *Pape,* 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). Because Section 1983 does not provide a remedy against the City, Section 1343(3), Title 28, United States Code, does not provide a jurisdictional basis for an action against the City because that provision is linked to statutory claims for relief based on the Civil Rights Acts. *Herzbrun* v. *Milwaukee County,* 504 F.2d 1189 (7th Cir. 1974); *Ybarra* v. *Town of Las Altos Hills,* 503 F.2d 250 (9th Cir. 1974); *Patterson* v. *City of Chester,* 389 F.Supp. 1093 (E.D. Pa. 1975). *See also: United Farm. of Fla. H. Proj., Inc.* v. *City of Delray Beach,* 493 F.2d 799, 802 n.[1](5th Cir. 1974).

[2] Although subject matter jurisdiction does not exist over plaintiff's claims against the City under Section 1343(3) and (4), Title 28, United States Code, a number of federal courts have ruled in cases involving claims of denial of procedural due process in employment termination that jurisdiction over a political subdivision can be based on the general federal question statute, Section 1331, Title 28, United States Code, and on the Fourteenth Amendment to the Constitution of the United States, if the $10,000 amount in controversy requirement is satisfied. *Hostrop* v. *Bd. of Jr. College District No. 515,* 523 F.2d 569 (7th Cir. 1975); *Roane* v. *Callisburg Independent School District,* 511 F.2d 633 (5th Cir. 1975); *Skehan* v. *Board of Trustees of Bloomsburg State College,* 501 F.2d 31 (3rd Cir. 1974), *vacated on other grounds,* 421 U.S. 983, 95 S.Ct. 1986, 44 L.Ed.2d 474 (1975); *Williams* v. *Brown,* 398 F. Supp. 155 (N.D. Ill. 1975); *Patterson* v. *City of Chester,* 389 F. Supp. 1093 (E.D. Pa. 1975); *Maybanks* v. *Ingraham,* 378 F. Supp. 913 (E.D. Pa. 1974). *See also: Dahl* v. *City of Palo Alto,* 372 F. Supp. 647 (N.D. Cal. 1974). *But see: Weathers* v. *West Yuma County School District R—J—1,* 387 F. Supp. 552 (D. Colo. 1974). These courts have implied a remedy against a political subdivision for violation of constitutional rights directly from the Fourteenth Amendment by applying and extending the theory of *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). *See generally:* Note, "Damage Remedies Against Municipalities For Constitutional Violations," 89 Harv. L. Rev. 922, 929 (1976). Adopting the reasoning of these authorities, it is

concluded that a claim for relief against the City of Independence can be based directly on the Fourteenth Amendment apart from Section 1983, Title 42, United States Code; and, therefore, that subject matter jurisdiction exists over the claims against the City under Section 1331, Title 28, United States Code, if the amount in controversy requirement is satisfied.

Defendants contend that the amount in controversy requirement has not been satisfied in this case. The general rule is that the amount in controversy must be determined from the complaint itself,

> "unless it appears or is in some way shown that the amount stated in the complaint is not claimed 'in good faith.' In deciding this question of good faith . . . it 'must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal.'"

Horton v. *Liberty Mutual Insurance Co.*, 367 U.S. 348, 353, 81 S.Ct. 1570, 1573, 6 L.Ed.2d 890, 894 (1961); *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283, 288, 58 S.Ct. 586, 82 L.Ed. 845 (1938). Although the complaint does not contain a prayer for a specific dollar amount of back pay and damages, it does seek

> ". . . back pay, full rights to normal salary increases, and retirement benefits . . . [and] such further actual damages as may be established on hearing. . ."

At the trial, plaintiff clearly established that his back pay and damage claims exceed the $10,000 amount in controversy requirement, and are made in good faith. The complaint will be considered amended to state that plaintiff's claim for back pay and damages exceeds $10,000. Rule 15(b) of the Federal Rules of Civil Procedure. Therefore, it is assumed for the purpose of disposing of this action

that subject matter jurisdiction exists of the claim for relief against the City of Independence under Section 1331, Title 28, United States Code, despite the doctrine of *Monroe* v. *Pape, supra.*

B. *Claim of Denial of Procedural and Substantive Due Process*

[3, 4] Plaintiff contends that the termination of his employment without a notice of specific grounds for the termination and a hearing violated rights to procedural and substantive due process under the Fourteenth Amendment. However, the requirements of procedural due process apply only to a deprivation of interests which come within the Fourteenth Amendment's protection of "property" or "liberty," *Board of Regents* v. *Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); *Perry* v. *Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); and the right to substantive due process is no greater than the right to procedural due process, *Buhr* v. *Buffalo Public School District*, 509 F.2d 1196, 1202 (8th Cir. 1975); *Evans* v. *Page*, 516 F.2d 18 (8th Cir. 1975). It must therefore be determined whether plaintiff was deprived of an interest in either "property" or "liberty" in connection with his discharge.

[5-7] The types of property protected by the Due Process Clause vary widely and what may be protected under some circumstances may not be protected under other circumstances. To have a property interest in a benefit,

> ". . . a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Board of Regents* v. *Roth, supra*, 408 U.S. at 577, 92 S.Ct. at 2709, 33 L.Ed.2d at 561.

It is generally held that public office or employment, and in particular an appointed office or position, is not a property interest within the meaning of the Fourteenth Amendment. *See, e.g., Board of Regents* v. *Roth, supra; Abeyta* v. *Town of Taos,* 499 F.2d 323, 327 (10th Cir. 1974); *Lontine* v. *Van Cleave,* 483 F.2d 966 (10th Cir. 1973); *Burks* v. *Perk,* 470 F.2d 163 (6th Cir. 1972), *cert. denied,* 412 U.S. 905, 93 S.Ct. 2288, 36 L.Ed.2d 970 (1973). This general rule is inapplicable in situations when public employees hold contractual rights to continuing employment under formal or *de facto* tenure grounds. *Perry* v. *Sindermann, supra; Buhr* v. *Buffalo Public School District,* 509 F.2d 1196 (8th Cir. 1975); *Abeyta* v. *Town of Taos, supra.* Summary termination of such employment, without a hearing and notice of reasons, under such circumstances, may be actionable. *Wilderman* v. *Nelson,* 467 F.2d 1173 (8th Cir. 1973).

[8] Plaintiff's claim that he was deprived of a property interest in his employment by his discharge, was tentatively dismissed for failure to allege any contractual or other *de facto* right to continued employment as Chief of Police in the "Order Denying Plaintiff's Motion For Summary Judgment and Narrowing Issues For Evidentiary Hearing" filed February 5, 1976, and hereby incorporated herein. At the trial, plaintiff did not present any credible evidence that he had either a contractual right to continued employment, or that there existed a *de facto* tenure system which gave plaintiff a legitimate expectation of continued employment. Rather, a preponderance of the evidence shows that plaintiff knowingly served as Chief of Police at the will of the City Manager and was subject to discharge without notice of reasons and a hearing at any time the City Manager determined that his discharge was "for the good of the service." It is therefore concluded that plaintiff had no property interest in his employment Chief of Police which would entitle him to procedural and substantive due process rights.

[9] Deprivation of an interest in liberty occurs when the discharge of a public employee imposes upon him a stigma or other disability that impairs or forecloses his freedom to take advantage of other employment opportunities. *Board of Regents* v. *Roth, supra; Arnett* v. *Kennedy,* 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974); *Goss* v. *Lopez,* 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975). For "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Wisconsin* v. *Constantineau,* 400 U.S. 433, 437, 91 S.Ct. 507, 510, 27 L.Ed.2d 515, 519 (1971). *Cf. Paul* v. *Davis,* 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), explaining limitations on the doctrine of *Wisconsin* v. *Constantineau, supra.*

[10, 11] To be "stigmatizing" the charges must be considerably graver than charges of improper inadequate job performance, or a failure to meet minimum standards of professional conduct. The charges must involve imputation of illegal, dishonest or immoral conduct which call the employee's good name, honor or integrity into question before a deprivation of liberty occurs. *Velger* v. *Cawley,* 525 F.2d 334 (2nd Cir. 1975); *Lake Michigan Col. Fed. of Teachers* v. *Lake Mich. Com. Col.,* 518 F.2d 1091 (6th Cir. 1975); *Russell* v. *Hodges,* 470 F.2d 212 (2nd Cir. 1972); *Springston* v. *King,* 399 F. Supp. 985 (W.D. Va. 1975); *Muir* v. *County Council of Sussex County,* 393 F. Supp. 915 (D. Del. 1975); *Bishop* v. *Wood,* 377 F. Supp. 501 (W.D. N.C. 1973), aff'd, 498 F.2d 1341 (4th Cir. 1974), aff'd, 423 U.S. 890, 96 S.Ct. 185, 46 L.Ed.2d 121 (June 8, 1976). Further, to be "stigmatizing" the charges must have been made public in some intentional or official manner which affects the discharged employee's chances of securing another job. *Ortwein* v. *Mackey,* 511 F.2d 696 (5th Cir.

1975); *Buhr* v. *Public School District*, 509 F.2d 1196 (8th Cir. 1975); *Kaprelian* v. *Texas Women's University*, 509 F.2d 133 (5th Cir. 1975); *Wellner* v. *Minnesota State Junior College Board*, 487 F.2d 153 (8th Cir. 1973).

Plaintiff contends that because his discharge occurred the day following Councilman Roberts' public statement charging him expressly and by implication with gross misconduct of the administration of the Police Department, and the actions of the City Council which followed, a "stigma" was imposed on his professional reputation which has impaired or foreclosed future employment opportunities. The defendants, however, have disproved plaintiff's contention that the circumstances of his discharge imposed a "stigma" upon his reputation by a preponderance of the evidence for three reasons.

First, the only official reason ever given for plaintiff's discharge by City Manager Alberg, who possessed sole authority to hire and discharge the Chief of Police, was that plaintiff was "[t]erminated under the provisions of Section 3.3(1) of the City Charter." Thus, there are no statements in plaintiff's official record imputing any illegal, immoral, or other "stigmatizing" conduct to him.

Second, the statement made by Councilman Roberts and the actions taken by the City Council had no causal connection to the termination of plaintiff's employment. City Manager Alberg had decided prior to the April 17, 1972, City Council meeting to discharge plaintiff, and had even obtained a replacement for plaintiff before the meeting. Further, the City Council and its members were prohibited by the City Charter to attempt in any manner to influence City Manager Alberg's decisions about hiring and discharging city employees, including the Chief of Police, so their action was unauthorized.

Finally, prior to his discharge, plaintiff was completely exonerated from any charges of illegal or immoral conduct by City Counselor Cottingham, who supervised the investigation of the plaintiff's administration of the Police Department, and by City Manager Alberg, who possessed the sole power to hire and discharge the Chief of Police. He was further exonerated subsequent to his discharge by the grand jury which was presented with the full investigative file referred to by Councilman Roberts in his public statement.

On the basis of the above findings of fact, it is concluded that the circumstances of plaintiff's discharge did not impose a stigma of illegal or immoral conduct on his professional reputation. At most, the circumstances of the termination of plaintiff's employment suggested that, as Chief of Police, plaintiff had been an inefficient administrator. Plaintiff was therefore not deprived of an interest in liberty in connection with his discharge, and accordingly he was not entitled to procedural due process rights under the Fourteenth Amendment.

C. *Claim That Discharge Was In Retaliation For Exercise of First Amendment Rights.*

Plaintiff contends that his employment was terminated in retaliation for his exercise of First Amendment rights. The Supreme Court has made clear that

> ". . . even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech."

Perry v. *Sindermann*, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 470, 477 (1972).

However, as factually found and herein legally concluded, plaintiff presented no evidence that he was discharged in retaliation for his exercise of any rights protected by the First and Fourteenth Amendments. The evidence presented by the defendants disproved this contention.

D. *"Good Faith" Defense.*

[12] Recent decisions of the United States Supreme Court have established the existence of a "good faith" defense against personal liability for damages under Section 1983, Title 42, United States Code. *O'Connor* v. *Donaldson*, 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975); *Wood* v. *Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975); *Scheuer* v. *Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). The defense exists for persons exercising executive functions. *O'Connor* v. *Donaldson, supra; Scheuer* v. *Rhodes, supra.* It also exists for members of the city council. *See e.g.: Rasmussen* v. *City of Lake Forrest, Illinois*, 404 F. Supp. 148 (N.D. Ill. 1975). *See Also: Wood* v. *Strickland, supra; Mims* v. *Board of Education of City of Chicago*, 523 F.2d 711 (7th Cir. 1975); *Bertot* v. *School District No. 1, Albany County, Wyo.*, 522 F.2d 1171 (10th Cir. 1975); *Jones* v. *Diamond*, 519 F.2d 1090 (5th Cir. 1975). Because of their legislative functions the immunity of city council members may be even broader than that accorded by the "good faith" defense. *Compare: Tenney* v. *Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951).

[13] Although the precise nature of the "good faith" defense as applicable to a city manager and members of a city council has not yet been fully explored or defined

by the courts of appeals[4] or the Supreme Court, the defense has been defined in other contexts. Under the most strict formulation of the defense, applied to members of a school board in *Wood* v. *Strickland, supra*, 420 U.S. 308, at 322, 95 S.Ct. 992, at 1000, 43 L.Ed.2d 214, at 225, and applied to administrators of a state mental hospital in *O'Connor* v. *Donaldson, supra*, 422 U.S. 563, at 577, 95 S.Ct. 2486, at 2494, 45 L.Ed.2d 396, at 408, the material factual issues are whether the individual defendant

> ". . . 'knew or reasonably would have known that the action he took within his sphere of official responsibility would violate the constitutional rights of [plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to [plaintiff]."

The Supreme Court has further emphasized that "[f]or purposes of this question, an official has, of course, no duty to anticipate unforeseeable constitutional developments." *O'Connor* v. *Donaldson, supra; Wood* v. *Strickland, supra.*

Had the individual defendants been sued in their individual capacities, defendants have clearly shown by a preponderance of the evidence that neither they, nor their predecessors, were aware in April 1972, that, under the circumstances, the Fourteenth Amendment accorded plaintiff the procedural rights of notice and a hearing at the time of his discharge. Defendants have further proven that they cannot reasonably be charged with constructive notice of such rights since plaintiff was discharged prior

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4. *Lane* v. *Inman*, 509 F.2d 184 (5th Cir. 1974); *Nelson* v. *Knox*, 256 F.2d 312 (6th Cir. 1958) [Stewart, J.]; *Cobb* v. *City of Malden*, 202 F.2d 701 (1st Cir. 1953) (Magruder, J., concurring); *Smetanka* v. *Borough of Ambridge, Pennsylvania*, 378 F. Supp. 1366 (W.D. Pa. 1974); *Bunch* v. *Barnett*, 376 F. Supp. 23 (D.S.D. 1974); *Oberhelman* v. *Schultze*, 371 F. Supp. 1089 (D. Minn. 1974); *Young* v. *Coder*, 346 F. Supp. 165 (M.D. Pa. 1972).

to the publication of the Supreme Court decisions in *Roth* v. *Board of Regents, supra,* and *Perry* v. *Sindermann, supra. See e.g.*: *Mims* v. *Board of Education of City of Chicago,* 523 F.2d 711 (7th Cir. 1975); *Bertot* v. *School District No. 1, Albany County, Wyo.*, 522 F.2d 1171 (10th Cir. 1975). Finally, the individual defendants have proven that they did not act with a malicious intent to deprive plaintiff of his constitutional rights or to cause plaintiff other injury.

However, the individual defendants have been sued only in their official capacities, and would, therefore, not be personally liable for any award of equitable relief in the form of back pay, or damages, regardless of their good faith. By suing the individual defendants only in their official capacities, and by joining the City of Independence as a defendant, plaintiff ultimately seeks relief from the City of Independence. The question presented is thus whether the City of Independence can assert a good faith defense based on the good faith of its agents against liability for claims based directly on the Fourteenth Amendment.

[14] The purposes of the good faith defense are (1) to avoid the injustice of subjecting a public official who is required by the legal obligations of his position to exercise discretion to liability in the absence of bad faith; and (2) to encourage public officials to execute their offices with the decisiveness and judgment required by the public good. *Wood* v. *Strickland, supra,* 420 U.S. at 319-321, 95 S.Ct. at 999-1000, 43 L.Ed.2d at 223-224; *Scheuer* v. *Rhodes,* 416 U.S. at 241-242, 94 S.Ct. at 1688-1689, 40 L.Ed.2d at 99-100. Substantial arguments have been made that the reasons for permitting persons acting under color of state law to assert a good faith defense against personal liability are inapplicable to actions against a governmental unit. *See, e.g.*: Note, "Damage Remedies Against Municipalities For Constitutional Violations," 89 Harv. L. Rev. 922,

955-958 (1976). The United States Court of Appeals for the Seventh Circuit has ruled that damages for violation of a constitutional right can be recovered from a governmental unit even though the governmental unit's agents were protected from personal liability by a good faith defense. *Hostrop* v. *Board of Junior College Dist. No. 515,* 523 F.2d 569, 576-579 (7th Cir. 1975); *cert. denied,* 425 U.S. 963, 96 S.Ct. 1748, 48 L.Ed.2d 208 (1976).

[15] Nevertheless, the imposition of liability on a governmental unit because of the acts of public officials acting in good faith would also impair the ability of public officials to exercise their legal duties forthrightly as required by the public good. The distinction between imposing personal liability on the official and imposing liability on the public body or agency that he serves which underlies the argument against permitting a governmental unit to assert a good faith defense is not convincing. A conscientious public official's discharge of his duties will be impaired regardless whether liability is imposed on him personally or upon the public as a whole. The difference in impairment is one of degree. It is the fact of liability, rather than the party upon whom it is directly imposed, which should be the controlling factor. It is therefore concluded that the City of Independence is entitled to assert a good faith defense against liability based directly on the Fourteenth Amendment; and that the City has established a good faith defense against liability in this action by proof of the good faith of the individual defendants who acted as the agents and officers of the City of Independence.

For the foregoing reasons, it is therefore

ORDERED and ADJUDGED that plaintiff's claims for relief be, and they are hereby, determined to be without merit. It is further

ADJUDGED that plaintiff be, and he is hereby, denied all relief prayed for in the complaint.

ON MOTION TO AMEND OR VACATE AND FOR ADDITIONAL FINDINGS

Plaintiff has moved to amend the findings of fact and conclusions of law and for additional findings of fact. Plaintiff has also moved to vacate or amend the final judgment or in the alternative for a new trial. Defendants have filed opposing suggestions.

Plaintiff's motion to amend the findings of fact and conclusions of law and to make additional findings, and the supporting suggestions have been carefully reviewed. The additional findings requested in paragraphs 1, 2, 3, and 4, while substantially true factually, are adequately covered on page 10 of the memorandum filed June 25, 1976. The findings requested in paragraphs 5, 6, and 7 are not supported by substantial evidence. The findings requested in paragraphs 8 and 9 will be denied for the reasons stated below.

Plaintiff bases his motion to vacate or amend the final judgment, or in the alternative for a new trial, on three grounds. First, he contends that no ruling was made on the question whether plaintiff had a right to notice and a hearing under Missouri law, and that Missouri law requires notice and a hearing. Second, he contends that the evidence supports a finding that there was an implied contract that his employment would only be terminated for cause with notice and an opportunity for a hearing. Third, he contends that there was a sufficient nexus between Councilman Roberts' statement and the actions of the City Council on April 17, 1972, and his discharge on April 18, 1972, to support a finding that "stigmatizing"

charges were made "in the course of" the termination of his employment.

(1) *State Law.*

The United States Supreme Court has recognized that a public employee has a "property" interest in his continued employment if state law guarantees a right to notice and hearing in connection with the termination of his employment. *Bishop* v. *Wood,* 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (June 10, 1976); *Board of Regents* v. *Roth,* 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). Plaintiff contends that under Missouri law, because he could only be discharged "for the good of the service," he was entitled to notice and a hearing.

Contrary to plaintiff's allegation that no ruling has been made on this contention, the contention was expressly rejected on page 17 of the "Order Denying Plaintiff's Motion For Summary Judgment And Narrowing Issues For Evidentiary Hearing," filed February 5, 1976. However, because of the importance of this issue, the reasons for that ruling will be more fully stated herein.

[16] Article 7, Section 4, of the Missouri Constitution of 1945 provides in pertinent part that ". . . all officers not subject to impeachment shall be subject to removal from office *in the manner and for the causes provided by law.*" (emphasis supplied) The Chief of Police of the City of Independence is not subject to impeachment under the Missouri Constitution, and thus Article 7, Section 4, was applicable to plaintiff. *Cf. State* v. *Williams,* 346 Mo. 1003, 144 S.W.2d 98 (1940). The principal issue in this case is what the applicable "law" is.

[17, 18] The city government of the City of Independence is organized in the council-manager form under a

"home rule" charter authorized by Article 6, Section 19, of the Missouri Constitution of 1945. Article 6, Section 22, of the Missouri Constitution of 1945 provides in pertinent part that

> "[n]o law shall be enacted creating or fixing the powers, duties or compensation of any municipal office or employment, for any city framing or adopting its own charter under this or any previous constitution. . . ."

This provision was intended to give "home rule" charter cities a "broad measure of complete freedom from State legislative control [over municipal employment decisions]." *State* v. *Cervantes*, 423 S.W.2d 791 (Mo. 1968). *See*: Schmandt, "Municipal Home Rule In Missouri," 1953 Wash. U.L. Quarterly 385, 406 (1953). *Cf. City of St. Louis* v. *Missouri Commission on Human Rights*, 517 S.W.2d 65 (Mo. 1974). This constitutional provision is persuasive authority that the applicable "law" governing the employment decisions of charter cities is the charter itself, and not state statutes or prior judicial law. This ruling is consistent with the Missouri "home rule" concept that matters of local interest are to be governed solely by the charter. *See*: Westbrook, Municipal Home Rule: An Evaluation of the Missouri Experience, 33 Mo. L. Rev. 45 (1968).

The Charter of the City of Independence (hereinafter "Charter") classifies municipal employees into the "classified" and "unclassified" service. Section 3.28 of the Charter expressly provides that an employee in the "classified" service shall have a right to notice and a hearing prior to the termination of his employment. Section 3.1 of the Charter accords similar rights to the City Manager. However, no such rights are expressly provided to heads

of administrative departments such as the Chief of Police. The only provision in the Charter pertaining to the manner of and grounds for, the discharge of the head of an administrative department is Section 3.3(1) which authorizes the City Manager to

> "[a]ppoint, and when necessary for the good of the service . . . remove all directors or heads of administrative departments. . . ."

[19] Plaintiff argues that in spite of the fact that heads of administrative departments are not *expressly* accorded rights to notice and a hearing, such rights are to be *implied* from the fact that heads of administrative departments were made dischargeable only "when necessary for the good of the service." However, from Sections 3.28 and 3.1 of the Charter, it is clear that the drafters of the Charter knew how to expressly provide for rights to notice and a hearing when such rights were intended. In view of the express provision of such rights to other employees, it is unlikely that the drafters intended to accord heads of administrative departments such rights by implication through use of the phrase "for the good of the service." Rather the absence of an express provision of such rights is persuasive evidence that no such rights were intended to exist.

Plaintiff has cited several early Missouri cases in support of his contention that an employee dischargeable only "for cause" or "for the good of the service" is entitled to notice and a hearing prior to his discharge.[1] However, these cases are distinguishable on their facts from this

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1. *State ex rel. Eckles* v. *Kansas City*, 257 S.W. 197 (Mo. App. 1923); *State ex rel. Reid* v. *Walbridge*, 119 Mo. 383, 24 S.W. 457 (Mo. 1893); *State ex rel. Denison* v. *City of St. Louis*, 90 Mo. 19, 1 S.W. 757 (Mo. 1886).

case.[2] To the extent that dicta in those cases, when read out of context, seems to support plaintiff's contention, those cases are not considered applicable. As stated above, the applicable "law" in this case is the Charter of the City of Independence, which clearly does not provide rights to notice and a hearing, and not state statutory or judicial law which may be to the contrary.

For these reasons, it is concluded that plaintiff was accorded no right to notice or a hearing by Missouri law.

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2. In *State ex rel. Eckles* v. *Kansas City, supra*, a discharged district inspector for the water department of the City of Kansas City petitioned for a writ of mandamus to compel the City of Kansas City to restore him to his position. The only reasons given for his discharge were

"[r]eduction in force and good of the service." However, there was substantial evidence that he had been discharged because of his political affiliation. [*Cf. Elrod* v. *Burns*, ... U.S. ....., 96 S.Ct. 2673, 49 L.Ed.2d 547 (June 28, 1976)]; and that his discharge was intended to be final. The City of Kansas City had a "complete civil service law governing tenure positions held by city employees" which was applicable to the discharged employee whose position in the competitive class of the city service was similar to that of the "classified" service of the City of Independence in this action. The applicable charter provision provided:

> "No person in the city's service shall be removed . . . because of political . . . beliefs of such persons; nor shall any person in the competitive class of the city service be removed . . . without first having received a written statement setting forth in detail the reasons therefor. * * * In case of discharge of any person owing to the reduction of force, the discharged perron shall receive a certificate so stating, and shall be placed on the eligible list with the same rank he had already attained, and shall have a preference over those on the eligible list, and those who have served the longest before being so discharged shall be first restored."

The writ was granted to compel the City of Kansas City to restore the discharged employee to his job because he had been discharged for political reasons, no detailed statement of the reasons for his discharge had been granted, and his name was not placed on the "eligible" list all in violation of the above charter provision. This case is distinguishable because it involved an employee with tenure under the civil service law, and the charter expressly gave him a right to a detailed statement of the reasons for his discharge, while plaintiff Owen was dischargeable at will and was accorded no right to notice and a hearing by the Charter of the City of Independence.

(*Continued on following page*)

(2) *Allegation of "Implied" Contract.*

Plaintiff contends that the evidence shows that although he had no express rights to notice and a hearing under the Charter, and no contract of employment, he was employed with the understanding that his employment would only be terminated for cause with notice and a hearing. He further contends that this "understanding" gave rise to a legitimate expectation of continuing employment sufficient to constitute a "property" interest.

However, the evidence not only fails to support this contention, but in fact refutes it. Plaintiff was employed with the understanding that he served at the will of the City Manager. He had no "legitimate expectation of continuing employment."

Footnote continued—

In *State ex rel. Denison* v. *City of St. Louis, supra*, a discharged police justice brought an action to test the validity of a resolution of the council of the municipal assembly of St. Louis which removed him from office. Police justices were appointed by the mayor for a term of four years unless removed "for cause." Because he could only be removed from office prior to the expiration of his four year term of office "for cause," a right to notice and a hearing were implied.

The Court expressly noted, however, that "[w]here an officer is appointed during pleasure, or where the power of removal is discretionary, the power to remove may be exercised without notice or hearing." Plaintiff Owen, in contrast to the police justice who was appointed for a term of years, served at the will and pleasure of the city manager.

Finally, in *State ex rel. Reid* v. *Walbridge, supra*, the commissioner of public buildings of St. Louis petitioned for a writ of prohibition to prohibit the mayor of St. Louis from trying him on charges of dereliction of duties prior to his removal from office as provided by the charter. He contended that a state statute enacted subsequent to the charter provision, which provided a procedure for forfeiture of public employment to be initiated by the prosecuting attorney, had repealed the charter provision authorizing the mayor to prefer such charges by implication. Thus, the charter in that case, contrary to the Charter of the City of Independence, expressly provided a right to a hearing. It should again be noted that each of these cases was decided prior to the adoption of the Missouri Constitution of 1945 which, as more fully stated on pages 3 and 4, *supra*, provides that the governing law on the rights of an employee of a charter city is the charter alone and not prior statutory or judicial law.

(3) *Whether "Stigmatizing" Charges Were Made "In The Course Of" The Termination of Plaintiff's Employment.*

In *Paul* v. *Davis*, 424 U.S. 693, 6 S.Ct. 1155, 47 L.Ed.2d 405 (1976), the Supreme Court in construing *Board of Regents* v. *Roth, supra*, stated:

> "Thus, it was not thought sufficient to establish a claim under §1983 and the Fourteenth Amendment that there simply be defamation by a state official; the defamation had to occur *in the course of* the termination of employment." (emphasis added)

Plaintiff contends that the evidence is sufficient to show that the alleged "stigmatizing" charges made by Councilman Roberts and actions of the City Council on April 17, 1972, were made "in the course of" the termination of plaintiff's employment.

[20] However, this contention was rejected because the evidence shows that the decision to terminate plaintiff's employment was made at least seven days prior to the April 17, 1972, City Council meeting by City Manager Alberg, who had publicly exonerated plaintiff from all charges of criminal conduct. There was no causal or other substantial connection between the events which occurred at the April 17, 1972, City Council meeting and plaintiff's discharge.

For the foregoing reasons, it is therefore

ORDERED that plaintiff's motion to amend the findings of fact and conclusions of law and for additional findings be, and it is hereby, denied. It is further

ORDERED that plaintiff's motion to alter or amend judgment, or in the alternative for a new trial be, and it is hereby, denied.

APPENDIX D

SUPREME COURT OF THE UNITED STATES
Office of the Clerk
Washington, D. C. 20543

June 26, 1978

Irving Achtenberg, Esq.
Suite 700
906 Grand
Kansas City, MO 64106

RE: City of Independence, Missouri, et al.
v. George D. Owen
No. 77-914

Dear Mr. Achtenberg:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Eighth Circuit for further consideration in light of Monell v. Dept. of Social Services of the City of New York, 436 U.S. (1978).

Very truly yours,

MICHAEL RODAK, JR., Clerk
By /s/ Edward Faircloth
Assistant Clerk